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AN EDITORIAL

THE United States Supreme Court, in a decision of utmost importance to labor and management, has decided that agreements to arbitrate future disputes in industries affecting interstate commerce may be enforced through Section 301(a) of the Labor-Management Relations Act of 1947 (Taft-Hartley Act). This ruling, by a vote of 7 to 1 (Justice Felix Frankfurter dissenting and Justice Hugo Black not participating), was handed down on June 3 in three cases, the leading one of which was *Textile Workers Union of America v. Lincoln Mills of Alabama.* The two companion cases were: *Goodall-Sanford, Inc. v. United Textile Workers of America, AFL, Local* 1802, and *General Electric Company v. Local* 205, *United Electrical, Radio and Machine Workers of America* (*U.E.*).

Section 301(a) of the Taft-Hartley Act authorizes companies and unions to sue for breach of collective bargaining agreements in the federal district courts "without regard to the amount in controversy or the citizenship of the parties." For a number of years, cases have come before federal courts in which one party to a labor-management contract sought to compel the other to proceed with arbitration in accordance with arbitration clauses in the agreements. These attempts resulted in sharp disagreement. Several judges of district and circuit courts held that there was no reason why the arbitration clause of a contract should not be subject to the same specific enforcement as any other provision; other judges took the view that while they might have *jurisdiction* over suits to compel arbitration, they lacked the means to invoke a remedy. Involved in many of these cases was the related issue of whether the Norris-LaGuardia Act, which limits injunctive relief in labor-management controversies, was a bar to specific remedies, through injunctions, for

the failure of a party to comply with his agreement to arbitrate. Evidence of the confusion which has prevailed on this important point of law is found in the Review of Court Decisions in this very issue of *The Arbitration Journal,* where it is reported that the Seventh Circuit Court of Appeals refused to enforce an arbitration agreement, claiming "lack of jurisdiction."

Writing the opinion in the *Lincoln Mills* case, Justice William O. Douglas said that Section 301(a) "placed sanctions behind agreements to arbitrate grievance disputes." He continued: "Plainly, the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the Federal courts over labor organizations. It expresses a Federal policy that Federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way."

In resolving the many conflicting federal court rulings on applicability of the Taft-Hartley Act, the Supreme Court has strengthened the arbitration process. It would be a mistake, however, to overlook the narrow scope of this decision or to assume that the problem of establishing a sound relationship between arbitration and the law has thereby been achieved.

The Supreme Court decision relates only to the enforcement of agreements to arbitrate; it has nothing specific to say about enforcement of arbitral awards or about remedial procedures when parties fail to perform "conditions precedent" to arbitration or to break a deadlock which might frustrate the process. Furthermore, complicated questions of conflict between federal and state laws still remain to be solved.

Almost from the day of the adoption of the Taft-Hartley Act, one or both of the major parties have advocated its modification or abolition. While this situation prevails, the Taft-Hartley Act cannot be the best possible vehicle for enforcement of arbitration agreements. Moreover, as long as several of the states have widely divergent arbitration laws, or no modern arbitration statutes at all, the Supreme Court decision in the *Lincoln Mills* case cannot be fully satisfactory in providing a framework for orderly procedure in giving effect to the agreement of the parties.

Referring to the legislative history of the Taft-Hartley Act, the Supreme Court said it was clear that "Congress adopted a policy

(*Continued on Page* 127)

PROCEDURAL AND SUBSTANTIVE ASPECTS OF LABOR-MANAGEMENT ARBITRATION

An AAA Research Report

PART I

The privacy of arbitration and the fact that companies and unions have developed their own customs and attitudes towards arbitration, make it very difficult for the average student of labor arbitration to generalize. As labor arbitration is comparatively new in American industrial life, the recorded works in the field are frequently inclined to be subjective, to deal with the experience of the author, and not to reflect the general practice. Insofar as cases processed by the American Arbitration Association are concerned, it appeared desirable to support the many pronouncements which have been made with regard to American Arbitration Association experience with a statistical study of a wide variety of aspects of the arbitration process.

In a general way it was known that parties preferred one type of arbitration board to another, that certain procedures were prevalent while others were the exception, that the fees paid to arbitrators constituted the largest item in the cost of arbitration, and that the cases involved certain types of issues. To support this knowledge by exact figures was the purpose of this survey.

Consequently, early in 1956, the Association undertook a study of awards rendered within the calendar year 1954 to find answers to these questions. Several thousand grievances were examined, but only 1,183 cases were used in the survey, these having been selected for their completeness. It was observed that in some of the cases administered by AAA, particularly where proceedings had to be begun with utmost speed because of emergency circumstances, there was insufficient information on such matters as representation of parties by counsel, the taking of arbitrator's oaths, etc. These cases were excluded from the final tabulations to avoid misleading weighting. Also excluded from the survey were the large number of cases initiated, but not completed, because parties were able to settle their grievances at some point before, during or after the hearing, but short of the award.

Initiation of Arbitration

An arbitration may be initiated by a Demand or a Submission. A Demand is filed unilaterally by the party seeking redress of a grievance under a collective bargaining agreement which contains an arbitration clause covering future disputes. A Submission, on the other hand, may be filed by the parties to any existing dispute when there is no previous agreement to arbitrate or where the arbitration clause merely provides for arbitration if the parties consent.

Determination of the extent to which parties initiated by Demands as against Submissions presented a special difficulty, in that parties who could have begun the arbitration process by unilateral Demand on the part of either side nevertheless preferred to jointly request arbitration by Submission Agreement. Joint requests for arbitration known to have occurred under circumstances in which Demands for Arbitration could have been filed were tabulated as Submissions. For that reason, the figures shown in the following table may not be taken as an indication of the extent to which future dispute arbitration clauses referring to the Rules of the American Arbitration Association are found in collective bargaining agreements.

TABLE I

Method of Initiation

	No. of Cases	*Percentage*
Demand	826	69.8
Submission	357	30.2
Total	1,183	100.0

Types of Arbitration Boards

Under American Arbitration Association Rules, single arbitrators, tri-partite boards or boards composed of all impartial arbitrators may be used, depending upon the wishes of the parties. The data showed that in almost 82 percent of the cases awards were rendered by single, impartial arbitrators.

It was found that tri-partite boards were most frequently used in complicated situations involving wage structures or practices peculiar to an industry, where parties may have believed the arbitrator would have difficulty in fully understanding the issues during the time available for hearings. On the other hand, in some situations, parties were found to have had a tradition of tri-partite arbitration

and that such boards were used in cases where there did not seem to be any technical reason for it.

TABLE 2

Neutral and Tri-Partite Boards

	No. of Cases	*Percentage*
Neutral Arbitrator or Boards		
Single arbitrator	965	81.6
Three neutral arbitrators	5	.4
Total all neutral	970	82.0
Tri-Partite Boards		
1 neutral, 1 labor 1 management	195	16.5
1 neutral, 2 labor 2 management	16	1.4
3 neutral, 1 labor 1 management	1	*
1 neutral, 2 labor** 1 management	1	*
Total tri-partite	213	17.9
Total	1,183	99.9†

* Less than .5 percent.

** Each labor member had ½ vote.

† Percentage figures do not add up to 100.0 because of dropping of fractions in rounding out to the nearest .5 percent.

Majority Awards

The question of unanimity in awards is a difficult one in tri-partite arbitration. Of the 1,183 cases studied, there were 213 in which tri-partite boards of one kind or another were used. In an overwhelming majority of these cases (85%) it was not possible for the parties to reach unanimous awards. Only in 15 percent of the cases were all the arbitrators able to unanimously agree.

TABLE 3

Awards by Tri-Partite Boards

	No. of Cases	*Percentage*
Majority awards	180	84.5
Unanimous awards	33	15.5
Total	213	100.0

The 33 instances of unanimous awards do not provide a wholly satisfactory indication of the rarity of such awards in tri-partite ar-

bitration. Closer inspection disclosed a variety of circumstances. On the one hand, there were a few cases where the members of a tripartite board had truly come to a unanimous decision. On the other hand, there were company-union situations where it had become traditional for the party-appointed arbitrator to concur in all awards even where they disagreed. In still another group of cases, it was apparent that though one of the arbitrators disagreed with the award, he permitted it to appear as "unanimous" for the sake of the salutory effect it would have on employer-employee relationships.

Selection of the Arbitrator

The survey showed that in 88 percent of the cases, parties chose to use AAA's standard procedures for selecting arbitrators. Briefly, this method involves the sending of identical lists of arbitrators' names to each party. Each side then lines out the names of arbitrators he objects to and indicates an order of preference for the others. When the two lists are returned to the Association, a mutual choice becomes evident.

In 6 percent of the cases surveyed, parties either named an arbitrator at the time proceedings were initiated or they specified some manner of selection other than the standard procedures described above. Sometimes the parties asked the Association to name one arbitrator from a standing panel they had agreed upon at the signing of the collective bargaining contract. Usually, such panels were established by reference to AAA lists.

TABLE 4

Method of Selecting Arbitrators

Method	*No. of Cases*	*Percentage*
Selected from AAA lists	1,045	88.3
Named directly by parties	73	6.2
Administrative appointments	63	5.3
No information available	2	*
Total	1,183	99.8**

* Less than .5 percent.

** Percentage figures do not add up to 100.0 because of dropping of fractions in rounding out to the nearest .5 percent.

Administrative appointments by AAA accounted for slightly more than 5 percent of the cases. Arbitrators were selected in this way

when parties were unable to find mutually acceptable arbitrators by the standard method and also, in a few cases, where the parties specifically asked that the sending of lists be dispensed with and that the Association make the appointments directly. The latter circumstance occurred especially in discharge cases, where contracts required appointment of arbitrators within 24 or 48 hours and in other similar circumstances where the possibility of back-pay obligations made time critical.

Occupations of Arbitrators

Arbitrators are chosen from a variety of occupations. The reasons why parties select some arbitrators and reject others cannot be exactly determined from this survey. More than 15,000 names appeared on lists submitted in the 1183 cases covered; AAA records do not provide any clue as to whether the occupation of these arbitrators was a factor in the choice of the parties. In a typical case, for instance, it might be found that two attorneys would be rejected while two others would be accepted. The same would hold true for engineers or other professions.

The conclusion seems warranted that individual persons are selected for their impartiality, integrity, competence, character and standing in the labor-relations community. In certain types of cases, those with industrial engineering backgrounds, such as consultants, industrial engineers or professors of industrial engineering would be requested. On other occasions, attorneys with National Labor Relations Board background would be sought. The table below shows the factual results of selections by the parties insofar as single or neutral arbitrators on tri-partite boards are concerned; party-appointed arbitrators on tri-partite boards were not considered in this tabulation.

TABLE 5

Occupational Status of Arbitrators

Vocation	*No. of Arbitrators*	*No. of Cases*	*Percentage of Total Cases*
Educator	130	495	41.8
Practicing Attorney	96	404	34.2
Professional Arbitrator	16	170	14.4
Consultant	18	67	5.7
Industrial Engineer	10	13	1.1
Labor-Relations Executive	9	14	1.2
Clergyman	5	7	.5
Miscellaneous	9	13	1.1
Total	293	1,183	100.0

In studying this table, it should be noted that the number of arbitrators with legal backgrounds actually exceeds the 96 practicing attorneys shown. These 96 include only those whose major income was derived from law practice, although some of them spent almost half their working time as arbitrators. The 16 classified as professional arbitrators devote their time exclusively to arbitration, although by education and earlier experience they were in other professions. In this as in other respects an effort was made to classify arbitrators in the particular field of their primary interest—the field with which they were generally identified. Among the 130 arbitrators listed as educators, about 20 percent were in law schools. Among the remaining educators, some were in school administration (deans, etc.) while others taught in schools of engineering, business administration, labor relations and economics.

Arbitrator's Oath of Office

Statutes of many states require that arbitrators be sworn, unless the oath of office is waived by the parties. In examining the extent to which this formality was complied with, it was discovered that 46 cases otherwise reported in this survey failed to contain sufficient information. Of the remaining 1,137 cases, the arbitrator's oath was taken in 37.5 percent of the cases and waived in 62.5 percent. In all AAA cases, however, the arbitrator's obligation to faithfully and fairly hear and examine the matters in controversy and to make a just award according to the best of their understanding, is affirmed in the Notice of Appointment which all arbitrators sign on accepting the case.

Representation of Parties by Counsel

Of the 1183 cases studied, attorneys represented one or both parties in over 63 percent of the cases.

TABLE 6

Representation by Counsel

	No. of Cases	*Percentage*
One or both parties represented	754	63.7
Neither party represented	429	36.3
Total	1,183	100.0

Of the 754 cases in which one or both parties were represented, the breakdown appears as follows:

TABLE 7

Extent of Representation by Counsel

	No. of Cases	*Percentage*
Both sides represented	365	48.4
Company only represented	292	38.7
Union only represented	97	12.9
Total	754	100.0

Ex Parte Proceedings

Provision is made in modern arbitration statutes and in American Arbitration Association Rules for *ex parte* proceedings, when one party fails to appear after due notice. Rarely, however, are such proceedings necessary. The following table shows that *ex parte* proceedings amounted to a little more than 1 percent of the total.

TABLE 8

Ex Parte Proceedings

	No. of Cases	*Percentage*
Ex Parte Proceedings		
Welfare fund	12	1.0
Others	3	*
Both Parties participating	1,168	98.7
Total	1,183	99.7**

* Less than .5 percent.

** Percentage figures do not add up to 100.0 because of dropping of fractions in rounding out to the nearest .5 percent.

A closer examination of the 15 *ex parte* cases showed that twelve involved payments into union-welfare funds. (Of these twelve cases, eleven concerned two locals of the same international, in the retail field. The twelfth involved a local in the metal-working industry). The defending parties in all cases were relatively small companies that acknowledged their indebtedness to the fund but failed to pay because of financial difficulty.

Of the three remaining *ex parte* arbitrations during 1954, two concerned the same local union and company; at the time of the first case, involving vacation pay, the company was in financial straits. In the second case, where the issue was seniority in layoff, the employer was in bankruptcy and participated in the arbitration

only to the extent of sending a stenographer to take notes at the hearing.

In the last case, the union walked out of the hearing after it had presented its argument. The issue in this arbitration was whether a machine breakdown entitled twenty employees, who were sent home early, to down-time pay.

Presence of AAA Tribunal Clerk

In more than 75 percent of the cases it was found that American Arbitration Association tribunal clerks were present at hearings. The clerk introduces the parties to the arbitrator, administers the oath, presents the demand or submission officially, keeps a record of witnesses and exhibits, makes arrangements for subsequent hearings, provides for the exchange of briefs, and other similar functions. Thus, the clerk relieves the parties and the arbitrators of ministerial tasks, permitting them to devote full attention to the issues in dispute.

Although a clerk may not be present, a considerable amount of his preparatory work goes into the hearing. This includes correspondence with the parties, construction of lists, appointment of arbitrators, scheduling of hearings, arrangements for briefs, delivery of the awards, etc. This work eliminates the need for direct contact between the parties, thus avoiding the suspicion that one side may have submitted arguments to the arbitrator which the other side had no opportunity to rebut.

TABLE 9

Presence of Clerks at Hearings

	No. of Cases	*Percentage*
Clerk present	895	75.7
Clerk not present	286	24.2
No hearings	2	*
Total	1,183	99.9**

* Less than .5 percent.

** Percentage figures do not add up to 100.0 because of dropping of fractions in rounding out to the nearest .5 percent.

Use of Transcripts

The value of transcripts has long been a debatable point in labor-management circles. Generally, parties find the cost and delay in delivery of the award which transcripts involve more justified

when the issues are complex and technical than when simple grievances are at issue. On the other hand, some companies and unions find it useful to have transcripts of all their cases since many such transcripts become the raw material for education and research.

In somewhat more than 22 percent of the cases studied, stenographic records of hearings were taken.

TABLE 10

Transcripts

	No. of Cases	*Percentage*
Transcripts taken	269	22.7
Transcripts not taken	912	77.1
No hearings	2	*
Total	1,183	99.8**

* Less than .5 percent.

** Percentage figures do not add up to 100.0 because of dropping of fractions in rounding out to the nearest .5 percent.

Briefs

In a substantial number of cases, one or both parties seek to supplement their presentation of their cases by filing briefs after the close of hearings. Although briefs are filed in less than 42% of the cases, this survey disclosed that when transcripts were made, briefs were also filed in 61.5% of those cases.

TABLE 11

Filing of Briefs

	No. of Cases	*Percentage*
Briefs filed	496	41.9
No briefs filed	687	58.1
Total	1,183	100.0

Under AAA Rules, post-hearing briefs are exchanged only through the tribunal clerk. Again, the purpose of this procedure is to avoid direct communication between the parties and the arbitrator and to make it certain that briefs are filed on time and submitted to the arbitrator in accordance with the exact arrangement of the two parties. The usual procedure is for briefs from the two sides to be turned over to the arbitrator simultaneously.

Use of Transcripts and Briefs

In the majority of cases where transcripts were made, post-hearing briefs were also filed. This again contributed to the extended duration of a case.

TABLE 12

Transcripts and Briefs

	No. of Cases	*Briefs filed*	*Percentage*
Transcripts taken	269	166	61.7
Transcripts not taken	912	330	36.2
No hearings	2		
Total	1,183	496	

The Association's Voluntary Labor Arbitration Rules are designed to provide the parties with speedy arbitrations. However, the time it takes to process a case is within control of the parties. In two of the examined cases, issues were submitted, arbitrators appointed, hearings held and awards announced, all within two days.

Many factors account for long intervals between filing of the demand or submission, and rendering of the award; the following were found to be the most common:

1. The number of issues submitted in a single case, and the complication of those issues.

2. Submission of post-hearing briefs, usually in the more difficult cases.

3. Delays in obtaining transcripts of the hearings, for which the arbitrator must wait before rendering his award.

4. Requests for adjournments by one or both parties.

5. Difficulty in selecting a hearing date acceptable to both parties and the arbitrator.

6. Inability of the parties to select arbitrators from the first or second lists submitted to them by the Association.

7. Delays, by mutual agreement of the parties, in returning the lists of arbitrators.

Time Duration for the Award

With respect to the duration of cases, our survey measured the period from the filing of the demand or the submission, to the rendering of the award by the arbitrator.

In the average case, an award was rendered from 2 to 3 months after filing of the demand or submission. In the following tabulations, the duration of the surveyed cases is shown.

TABLE 13
Time Duration

Duration	*No. of Cases*	*Percentage*
Under 1 month	28	2.3
1 month but less than 2 months	240	20.3
2 months but less than 3 months	388	32.7
3 months but less than 4 months	217	18.3
4 months but less than 5 months	126	10.6
5 months but less than 6 months	72	6.1
6 months but less than 7 months	42	3.6
7 months but less than 8 months	16	1.4
8 months but less than 9 months	19	1.7
9 months but less than 10 months	12	1.1
10 months but less than 11 months	8	.7
11 months but less than 12 months	7	.6
12 months and over	7	.6
Information not available	1	*
Total	1,183	100.0

* Less than .5 percent.

Effect of Transcripts on Time Duration

By excluding the 269 cases in which transcripts were taken, the average fell within the 1 to 2 months group. The average time for those 269 cases was found to be within the 4 to 5 months group.

TABLE 14
Effect of Transcripts on Time Duration

	No. of Cases	*Average number of months*
Transcripts taken	269	4.5
Transcripts not taken	912	1.9
No hearings	2	
Total	1,183	

Resort to Court Action

Judicial procedures are rarely invoked either to compel arbitration or to confirm or vacate awards. The examination of the

cases revealed few instances in which recourse was made to the courts, as shown below:

TABLE 15
Court Action

	No. of Cases	*Percentage*
Cases with indication of court action	12	1.0
Cases with no indication of court action	1,171	99.0
Total	1,183	100.0

An indication of the disposition of the twelve contested cases is revealing. In three cases, court orders were issued directing that arbitration proceed. In a fourth case, a motion for an injunction staying arbitration proceedings was denied. In five other cases, awards were confirmed. Three of these cases were brought to court for routine confirmation although the employers had not refused to comply with the award or contested its validity. Awards were vacated in only three cases. In one of these cases, it was held that an award was not binding upon one member of an employers' association, under special circumstances where the arbitration agreement was signed by the association and not by the member company. In a second case, it was ruled that the arbitrators exceeded their authority in establishing an effective date for a decrease in wage rates where the parties had not sanctioned a decision on retroactivity. The third award was successfully attacked in court on procedural grounds, relating to jurisdiction of the National Labor Relations Board.

Fees of Arbitrators

Arbitrators' per diem rates were found to be clustered around the $100 per day mark, with the range being from as low as $25 to as high as $200. In three cases, the arbitrator waived fees because of hardship on the parties.

Billing procedures normally include a set amount per day of hearing and the same amount per day of preparation, study of notes and exhibits, and writing of the award. This auxiliary time is popularly called "study days." This term is used in this report.

It is the American Arbitration Association's policy and practice to have the rate of compensation for the arbitrator agreed upon in advance, through the Association, in order that parties may know

before the arbitrator is appointed the approximate costs they will incur on this item, which is the largest direct expense in arbitration. This is done so as to avoid the discussion of fees at the hearings, which may possibly cause prejudice.

TABLE 16

Arbitrators' Per Diem Fees

Per Diem Fee	*No. of Arbitrations*	*Percentage*
No fee	3	*
$ 25.00	1	*
$ 50.00	88	7.4
$ 75.00	314	26.3
$ 80.00	2	*
$100.00	690	57.7
$125.00	35	2.9
$150.00	15	1.3
$200.00	4	*
$ 75.00 per hearing day $47.00 per study day	1	*
$ 75.00 per hearing day $50.00 per study day	20	1.7
$100.00 per hearing day $50.00 per study day	2	*
$100.00 per hearing day $75.00 per study day	6	.5
$100.00 per hearing day $80.00 per study day	1	*
Flat fee per case	2	*
Information not available	11	.9
Total	1,195**	98.7†

* Less than .5 percent.

** The difference between the total number in this table and that in previous tables, is accounted for by the presence in six cases of three neutral arbitrators, each of whom was separately tabulated. AAA keeps no record of compensation paid by parties to their own arbitrators.

† Percentage figures do not add up to 100.0 because of dropping of fractions in rounding out to the nearest .5 percent.

The arbitrators' per diem rates were $100 or less in almost 92% of all the studied cases. Slightly less than 34% fell within the $75.00 or less group.

Hearing Days

In more than 81 percent of the cases, a single arbitration hearing provided sufficient time to present the evidence and arguments.

In slightly more than 11% of the cases, two hearings proved sufficient. In 4 percent of the arbitrations, the parties required three hearings. Four or more hearings were necessary in less than 3 percent of the cases.

TABLE 17

Number of Hearings

No. of Hearings	*No. of Cases*	*Percentage*
0	2	*
1	962	81.3
2	134	11.3
3	50	4.2
4	16	1.4
5	5	*
6	6	.5
7	2	*
8	3	*
9	1	*
10	1	*
11	1	*
Total	1,183	98.7**

* Less than .5 percent.

** Percentage figures do not add up to 100.0 because of dropping of fractions in rounding out to the nearest .5 percent.

Arbitrators' Study Days

The biggest single item of expense in arbitration is the arbitrator's fee. It is customary for arbitrators to charge a per diem fee, both for days of hearing and for days spent in study of evidence and exhibits and in preparation and writing of the award and opinion. The several tables following indicate the number of "study days" in comparison to the number of hearing days. It is significant to note that in 47.9% of the 962 cases in which there was only one hearing day, arbitrators charged for one or less "study days." If in addition the cases which had two and more hearing days were considered in order to determine the relationship between "study days" and hearing days, it would appear that in 50% of cases the "study days" were equal to or less than the number of hearing days. For purposes of these tables, meetings of tri-partite boards on days subsequent to hearings are computed as "study days."

TABLE 18

Ratio of Study Days to Single Hearing Days

Hearing days	*No. of Study Days*	*No. of Cases*	*Percentage*
	No study days	30	3.1
	Less than 1	51	5.3
One	1	380	39.5
	More than 1, less than 2	103	10.7
day	2	171	17.8
	More than 2, less than 3	84	8.7
of	3**	99	10.3
	4**	34	3.5
hearing	5	4	*
	6	3	*
	7	1	*
	8	1	*
	10	1	*
		962	98.9†

* Less than .5 percent.
** Fractional days disregarded.
† Percentage figures do not add up to 100.0 because of dropping of fractions in rounding out to the nearest .5 percent.

It is of interest to note that the case requiring ten study days related to two job evaluation grievances in the diesel-engine industry. The case that required eight study days involved two wage-structure re-openings.

TABLE 19

Ratio of Study Days to Cases with Two Hearing Days

Hearing Days	*No. of Study Days*	*No. of Cases*	*Percentage*
	No study days	1	.7
	Less than 1	3	2.2
Two	1	23	17.2
	More than 1, less than 2	14	10.4
days	2	39	29.1
	More than 2, less than 3	9	6.7
of	3*	21	15.7
	4*	14	10.4
hearings	5	4	3.0
	6	2	1.5
	7	2	1.5
	11	1	.7
	13	1	.7
		134	99.8**

* Fractional days disregarded.
** Percentage figures do not add up to 100.0 because of dropping of fractions in rounding out to the nearest .5 percent.

Two Hearing Days

In the cases requiring two hearings, the survey disclosed a practice, in almost 30 percent of the cases, of an equal number of study and hearing days.

The case requiring thirteen study days concerned five issues for a new contract in the newspaper publishing industry. The case that required eleven study days related to a discharge of an employee in a plant working on government contracts, following invocation of the "Fifth Amendment" before a Congressional investigating committee.

TABLE 20

Ratio of Study Days to Cases with Three Hearing Days

Hearing Days	*No. of Study Days*	*No. of Cases*	*Percentage*
	No study days	1	2.0
	Less than 1	1	2.0
Three	1	4	8.0
	More than 1, less than 2	1	2.0
days	2	12	24.0
	More than 2, less than 3	2	4.0
of	3*	7	14.0
	4*	8	16.0
hearings	5*	7	14.0
	6	3	6.0
	7	2	4.0
	9	2	4.0
		50	100.0

* Fractional days disregarded.

The ratio of study days to hearing days, in this category, does not bear as close a relation to each other as in the previous tables. Here, the greater number of cases occur within the two study day period. It is interesting to note that in the cases with a greater number of hearing days the ratio of study days declines very considerably.

Of the two cases that required nine study days, one concerned job evaluations in the automobile industry, and the other related to grievances over holiday and vacation pay in the hotel industry.

In the four day hearing category, again the ratio of study days to hearing days does not conform to a uniform pattern. The majority of the cases fell within the three study day range.

TABLE 21

Ratio of Study Days to Cases with Four Hearing Days

Hearing Days	*No. of Study Days*	*No. of Cases*	*Percentage*
	2	2	12.5
Four	3*	6	37.5
	4	2	12.5
days	5	1	6.2
	6	1	6.2
of	7	1	6.2
	9	1	6.2
hearings	11	2	12.5
		16	99.8**

* Fractional days disregarded.

** Percentage figures do not add up to 100.0 because of dropping of fractions in rounding out to the nearest .5 percent.

One case requiring eleven study days concerned a grievance over job classifications in the aviation-service field. The other case requiring eleven study days related to seven grievances, and covered a multitude of issues in the textile industry.

Because of the few cases that occurred within the five hearing day group, an accurate analysis of the ratio of study days to hearing days would prove of little value, although the ratio does appear equal, in that two of the five cases fell within the five study day range.

TABLE 22

Ratio of Study Days to Cases with Five Hearing Days

Hearing Days	*No. of Study Days*	*No. of Cases*	*Percentage*
Five	3	1	20.0
days	5	2	40.0
of	9	1	20.0
hearings	14	1	20.0
		5	100.0

One case required fourteen study days and contained five grievances. Three of the grievances concerned wage incentives, and the remaining two related to job evaluations in the electrical-appliance field.

In the cases requiring six hearing days, the study days ranged from an equal ratio of six study days, to a two-to-one ratio of twelve study days.

TABLE 23

Ratio of Study Days to Cases with Six Hearing Days

Hearing Days	*No. of Study Days*	*No. of Cases*	*Percentage*
Six	6	1	16.6
days	7	1	16.6
of	8	1	16.6
hearings	11	1	16.6
	12	2	32.3
		6	98.7*

* Percentage figures do not add up to 100.0 because of dropping of fractions in rounding out to the nearest .5 percent.

One of the two cases requiring twelve study days, related to a contract-negotiation question in the steel industry, and the other concerned nine separate grievances covering a multitude of issues.

The ten cases in the table below range from two with no hearing days, to one case that required eleven hearing days. Another case required ten hearing days and twenty-two study days.

TABLE 24

Ratio of Study Days to Cases with Varying Number of Hearing Days

Hearing Days	*No. of Study Days*	*No. of Cases*	*Percentage*
0	2	2	20.0
7	2	1	10.0
7	5	1	10.0
8	6	1	10.0
8	8	1	10.0
8	17	1	10.0
9	15	1	10.0
10	22	1	10.0
11	15	1	10.0
		10	100.0

Seven of the cases contained multiple grievances, with one case actually having thirty-four grievances. An eighth case concerned a wage-structure question. The remaining two cases were submitted without hearing to the arbitrator who decided them on written briefs.

Arbitrators' Total Fees

Total arbitrators' fees in the studied cases during the calendar year 1954 were found to be as follows:

TABLE 25

Total Fees

Fees	*No. of Cases*	*Percentage*
No fee	3	*
Under $100.00	40	3.4
$ 100.00 - 199.99	314	26.3
200.00 - 299.99	412	34.5
300.00 - 399.99	214	17.9
400.00 - 499.99	69	5.8
500.00 - 599.99	39	3.2
600.00 - 699.99	29	2.4
700.00 - 799.99	13	1.0
800.00 - 899.99	8	.7
900.00 - 999.99	8	.7
1,000.00 - and over	34	2.8
Information not available	12	1.0
Total	1,195**	99.7†

* Less than .5 percent.

** The difference between the total number in this table and that in previous tables, is accounted for by the presence in six cases of three neutral arbitrators, each of whom was separately tabulated.

† Percentage figures do not add up to 100.0 because of dropping of fractions in rounding out to the nearest .5 percent.

The most common total fee was within the $200.00 to $299.99 group. The next most common fell within the $100.00 to $199.99 total fee range. More than 82% of the total fees were within the $399.99 or less category.

In analyzing this table, it should be understood that arbitrators' total fees depend upon their per diem rates and the number of days of study of the record and preparation of the award.

AAA Administrative Fees

The Association charges an administrative fee of $25.00 per party, per hearing day, to defray the costs of administering arbitrations. The Association also charges nominal amounts when hearings are postponed and when hearings extend into the evenings. Since most arbitrations are completed with one-day hearings which are completed during normal working hours, most administrative fees are $25.00 per party.

A separate tabulation of administrative fees is unnecessary since the summary of numbers of hearings per case (see table 17), indicates the administrative fees in the studied cases.

Other Expenses

The costs of transcripts are paid for directly by the parties and not through the AAA. Naturally, also excluded are the expenses incurred by each party in preparing its case. The total expenses per case are shown below:

TABLE 26

Total Expenses Other Than Administrative and Arbitrators' Fees

Total Expenses	*No. of Cases*	*Percentage*
No expenses	161	13.6
Under $25.00	440	37.2
$ 25.00 - 49.99	247	20.9
50.00 - 74.99	119	10.1
75.00 - 99.99	90	7.6
100.00 - 124.99	36	3.1
125.00 - 149.99	25	2.1
150.00 - 174.99	16	1.4
175.00 - 199.99	8	.7
200.00 - and over	28	2.3
Information not available	13	1.0
Total	1,183	100.0

Included in this category, are such items as arbitrators' and clerks' travel expenses, meals and rental of hearing rooms. Although the Association's hearing rooms are always available where AAA maintains offices, the parties may be located at some distance and decide to hold the hearing elsewhere. In that event, they will share the expense of the hearing room, as well as long distance telephone calls and telegrams, and any unusual expense incurred in the administration of the arbitration.

Part II of this report, dealing with substantive aspects of labor-management arbitration, will appear in the next issue of THE ARBITRATION JOURNAL.

PATENT ARBITRATION AND PUBLIC POLICY

by Albert S. Davis, Jr.
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Arbitration is a special procedure for deciding (not settling) disputes—inexpensively, quickly, expertly, privately, and usually with a minimum of rancor. The general lawyer and house counsel, as well as the patent specialist,[1] would do well to consider its application to patent problems.

A high percentage of run-of-the-mill cases revolve around the enforcement, construction, or both, of contracts having patents as their subject-matter. For example, E. T. Corbett,[2] having invented a new and improved gondoleon, and filed some but not all of the possible United States patent applications on it, has succeeded in peddling it to the International Gondoleon Corporation. The contract provides for assignment of the invention, the patent "rights" and existing and any additional patent applications, and any patents which may issue, and formal assignments have been executed and recorded so far as possible. Further and foreign patent applications are to be filed and prosecuted in Corbett's name by International "where justified." International has made a down payment of $5,000 to Corbett, and agreed "to use reasonable diligence in perfecting, reducing to commercial practice, producing and marketing these inventions," and to pay quarterly a royalty of 5% on its billings "for such apparatus to the extent it is covered by the Licensed Patent Applications and Patents."

After almost a year, no royalties have been paid and no foreign applications have been filed. International says that, within its general pattern of product development, it is doing what it diligently can and should to perfect the gondoleon, and that foreign patenting is not justified. (Privately, it thinks the invention is a dog.) Corbett says this is not true. (Privately, he suspects that International is going to switch much of its general activities from gondoleons to

1. Davis, A. S., Jr. and Stowell, H. T., The Patent Profession and the General Lawyer, 13 Law & Contemporary Problems 310 (1948).
2. (Mrs.) E. T. Corbett, The Inventor's Wife (1883).

grommels, and is sidetracking him. He is worried about a rumor that International's Belgian Associate, Société Anonyme Pour Fabrication des Gondoleons, will be set up in the business of making gondoleons for the European market, cartel-protected, but free of patents and royalties.)

It can be safely agreed that, under such a set of facts, there are enough questions of construction, breach of contract, and breach of faith to guarantee a series of lawsuits to rival *Jarndyce v. Jarndyce* in time and expense, and *Bardell v. Pickwick* in temper. The individual or collective interests of E. T. Corbett, International Gondoleon, *or their counsel* do not justify such litigation.

What they do justify, of course, is getting at the facts, and supplying a solution in terms of those facts.

Other articles[3] have gone into a good deal of how and why arbitration does this. In brief, if Corbett and International do not have an arbitration clause in their contract, they may nevertheless always agree to arbitrate.[4] If they have an arbitration clause in their contract and either decides to invoke it, arbitration will be the forum;[5] if either commences a lawsuit, the other may stay it in favor of arbitration.[6] There are, of course, general exceptions to the invariability of this; an otherwise revocable contract containing an arbitration clause cannot be enforced by arbitration,[7] and at times certain questions of public policy, which I shall consider further, may intrude.

Assuming an arbitration under American Arbitration Association Rules along fairly usual lines, the moving party will present his demand for arbitration to the Association, and forward a copy to, or serve a copy upon, the other party who has seven days in which to answer. General or particular failure to answer is taken as a denial. The Association will send to each party duplicate lists of possible arbitrators, picked for their special fitness to deal with problems of inventions, product development contracts, and patents; each party may arbitrarily strike off the lists such names as are not acceptable. From those not stricken off, using additional lists if necessary, the

3. See, e.g., Robb, J. F., Arbitration Procedure Compared with Court Litigation in Patent Controversies, 17 Law & Contemporary Problems 679 (1952); Davis, A. S., Jr., Patent Arbitration: A Modest Proposal, 10 Arb. J. (N.S.) 31 (1955).
4. N.Y.C.P.A., sec. 1448.
5. N.Y.C.P.A., secs. 1448 (as amended), 1450.
6. N.Y.C.P.A., sec. 1451.
7. N.Y.C.P.A., sec. 1448; *Matter of Albrecht Chemical Co.*, 298 N.Y. 437, 84 N.E. 2d 625 (1949).

Association will select three arbitrators. They might be a patent lawyer, a research and development director, and a mechanical engineer with practical experience in the field of gondoleon fabrication. A hearing date, usually in ten days, is set; extensions may be secured by stipulation, or, for cause, by the arbitrators or the court. At the hearing, where the parties are represented by counsel unless they expressly waive this right, the arbitrators are sworn, and testimony (which may be sought by subpoena, and is under oath if the arbitrators require it) is then taken; arbitrators usually are extremely liberal in admitting evidence. The great majority of arbitrations are conducted in one day; more complicated issues and extended proof naturally lengthen this. The arbitrators render an award in writing, usually without opinion. The prevailing party may move in court to confirm; the loser may oppose or move to vacate for a limited number of serious reasons, including corruption, fraud, partiality, excess of authority, defective award, failure to receive material evidence, and violation of public policy.[8]

What is it we want for our clients? As advocates, a decision, of course. But as *counsel,* do we not want something more? Few of us would openly admit that, for Corbett, we would wish to hang the case on a little man against big man appeal to a hopefully emotion-moved judge. Nor for International Gondoleon would we look forward to driving Corbett into defeat or unfair settlement through five years of litigation and $50,000 expense. As a matter of fact, most cases, even the tangled affairs of E. T. Corbett, are not won that way, and if there is a judgment so based, it resolves nothing in fact.

What we do want is a chance to present all the pertinent facts, to argue their effect, and to have the evidence and the argued effect of the facts considered by an unusually competent judge.

If we are after the facts, the *pertinent* facts, there is no better way to determine them than submitting all the evidence to what amounts to an expert panel of fact-finding judges. If one objects to this that technically inadmissible testimony will be heard, there are both formal and practical answers. The formal ones include the statutory adjuration to hear all *material* evidence on pain of handing down a voidable award;[9] and the time-honored habit with federal

8. A brilliant brief summary appears in Committee on Arbitration, The Association of the Bar of the City of New York, An Outline of Arbitration Procedure (1956).
9. N.Y.C.P.A., sec. 1462(3).

equity judges of saying "I'll read it, and then decide whether to admit it." The more practical answers, though, are the fact that most significant rules of evidence rest on a sound basis of common sense to which arbitrators are perfectly amenable; that arbitration submissions can provide for major trick rules (such as that on foreign reduction to practice, in interferences); and that experience shows that arbitrators don't go off the beam.[10]

If we are after experienced judgment, that too we find here. There is no other jurisprudential system in which the parties are freely permitted to select judges especially qualified for a particular trial from an already specialized panel.

What difficulties appear in arbitration? First, there is no appeal on the merits, and little on the law, except in a few states or on grounds which would lead to a nasty mistrial in an appealed court case. Second, there is a special need to frame the issue. Third, there is the problem of evidence. Fourth, there is less opportunity to argue technical law at length. These have already been commented on in some detail[11] in available publications.

The problem of public policy may be defined, in brief, as the proposition that patent subject-matter is so peculiar that it cannot or should not be permitted to be handled in arbitration proceedings.

This proposition is based on two contentions, (a) that the federal courts have a peculiar and preemptive stake in patent litigation, and (b), quite bluntly, that to arbitrate patent matters will assist evil intentions and illegal acts.

It seems quite obvious that, since a great deal of our patent contract litigation is presently carried on in the state courts, the argument that federal venue should be required where arbitration is accepted as part of the jurisprudential system of a state is without substance.

There are, however, two other usual sources of patent litigation, where time and expense are such formidable factors as to have aroused very serious public and legislative criticism.[12] I refer, of course, to interference proceedings and infringement suits—a subject of more

10. See Robb, *op. cit. supra* note 3; Mentschikoff, S., The Significance of Arbitration—A Preliminary Inquiry, 17 Law & Contemporary Problems 698, at 706 *et seq.* (1952).
11. Robb, Davis, *supra* note 3; Mentschikoff, *supra* note 10.
12. American Patent System, Sen. Report No. 72, 85th Congr., 1st Sess. (S. Res. 167); Hearings before the Subcommittee on Patents . . ., Committee on the Judiciary . . . on Sen. Res. 92, 84th Congr., 1st Sess.; both *passim*.

particular interest to the patent counsel among us.

The contention for an exclusive federal jurisdiction as to interference proceedings is a weak one, for it must be based on the statement that a formal interference proceeding is made available in the Patent Office and appellate courts by statute and rule,[13] and that this presumes an intention of exclusivity of forum. Against this must be set the fact that the Rules provide for termination of an interference by written disclaimer or concession.[14] As has been pointed out, such a disposition of an interference is not binding on third parties,[15] and, since such papers would have to be filed to close out an arbitrated interference, there would always be the possibility of third-party attack. That is also the case with the formal interference, though it has a great deal of variously described persuasive power.[16]

As for infringements, their normal forum is the federal courts. It seems quite clear, in view of *Cavicchi v. Mohawk Mfg. Co.*,[17] that an arbitrated infringement is dispositive between the parties if both infringement and validity are tried.[18] Of course, it is not dispositive as to third parties but, unfortunately, neither is a litigated result, with the possible pragmatic exception of invalidity in the same circuit.

There is a further problem as to federal jurisdiction of arbitrators. The growing pains of arbitration in the federal courts[19] have been more acute than those in the state courts, and the text of the Federal Arbitration Act[20] does little to help. The problem is not whether

13. 35 U.S.C. 135, 141, 146; Rules of Practice in the United States Patent Office in Patent Cases, Nos. 201-286, 301, 303-304.
14. Rules, No. 262. A junior party may usually, of course, obtain the same effect by failure to take evidence.
15. Deller, A.W., Extent and Usefulness of Arbitration in Settling Patent Disputes, 3 Arb. J. (N.S.) 100, at 109-110 (1948).
16. *Morgan v. Daniels*, 153 U.S. 120, 38 L. Ed. 657, 14 S. Ct. 772 (1894) is the parent case.
17. 43 U.S.P.Q. 419 (Supr. N.Y., 1938), aff'd 256 App. Div. 1069, 12 N.Y.S. 2d 360 (1st Dept. 1939—memo.), aff'd 281 N.Y. 629, 22 N.E. 2d 179; rearg. den. 281 N.Y. 669, 22 N.E. 2d 763 (1939—memos.); app. dism. for want of substantial federal question, 308 U.S. 522, 60 S. Ct. 294, 84 L. Ed. 442 (*per cur.* 1939), rearg. den. 308 U.S. 639, 60 S. Ct. 382, 84 L. Ed. 531 (1940—memo.); see 34 F. Supp. 852 (D.C.S.D.N.Y. 1940); note, 8 U. Chi. L. Rev. 530 (1941); Deller, *op. cit. supra* note 15, at 103, 108-109. On the distinction between a federal civil action and a state civil action *or special proceeding*, see N.Y.C.P.A. 4, 5, 1459; and *Matter of T. J. Stevenson & Co.*, 129 N.Y.L.J. 169, col. 8 (Supr. Jan. 16, 1953); *Tugee Laces, Inc. v. Mary Muffet*, 297 N.Y. 914, 79 N.E. 2d 744 (1948).
18. On the practical level, see Robb, *op. cit. supra* note 3.
19. Cf. e.g., Nields, J., in *Zip Mfg. Co. v. Pep Mfg. Co.*, 44 F. 2d 184, at 186 (D.C.D. Dela. 1930).
20. 9 U.S.C., secs. 1-15.

an award, once duly entered as a judgment, is enforcible, but whether arbitration can be compelled, directly by order, or indirectly by stay, assuming that an agreement to arbitrate has been executed. Earlier district court patent cases indicated that, for statutory textual and unspecified policy reasons,[21] it could not. Later non-patent cases construing the Federal Arbitration Act have given a wider statutory construction,[22] and the whole attitude of the federal courts appears less repugnant to patent arbitration.[23] On the practical side, it is apposite to suggest that interferences and infringements will seldom be arbitrated on the basis of a clause in a pre-existing contract, but rather where there has been a specific agreement for the particular arbitration, and that a party to such a specific agreement will be under an almost unavoidable compulsion to stand by his specific word so given.

When we talk of these jurisprudential questions, however, we are merely plucking nervously at the fringes of what counsel mean when they wonder whether public policy permits patent arbitration. What many of them mean is:—is *any* contractual arrangement or any dispute affecting patent property a fit subject for arbitration in view of the fact that an arbitration is a private binding settlement? The psychological background for this emotional approach is that patents are a private though lawful monopoly, that they have in the past proved useful tools of other forms or plans of monopoly which have been held to be illegal, that the Department of Justice has increasingly attacked and punished their use in such plans and forms of illegal monopoly, and that a large coterie of "liberal" thinkers and planners have persistently attacked the patent system in its present form.

I do not propose to spend any time defending the patent system; it has been quite competently done in recent months by such completely diverse authorities as Senator Joseph C. O'Mahoney, Dr. Vannevar Bush, and the National Association of Manufacturers.[24]

21. *Zip Mfg. Co. v. Pep Mfg. Co.*, *supra* note 19; *In re Cold Metal Process Co.*, 9 F. Supp. 992 (D.C.W.D. Pa. 1935).
22. See e.g., *Donahue v. Susquehanna Collieries Co.*, 138 F. 2d 3 (C.C.A. 3, 1943); and review of later cases in Robb, *op. cit. supra* note 3, at 694 *et seq.*
23. *Martin v. Morse Boulger Destructor Co.*, 105 U.S.P.Q. 455, at 458 (C.A. 3rd, 1955); *American Locomotive Co. v. Chemical Research Corp.*, 80 U.S.P.Q. 63 (C.A. 6th, 1948); *Besser Mfg. Co. v. United States*, 93 U.S.P.Q. 321, at 322-323 (U.S. Supr. 1952).
24. American Patent System, *supra* note 12; Report, at 1, 30; Proposals for Improving the Patent System, S. Res. 167, 84th Congr., 2d Sess., Study No. 1, at 1-2; Hearings, at 259-260.

A critic attacking the arbitration of patent suits of any type on this score of public policy must advance his contentions along one of two lines. The first is to attack, not arbitration's secrecy, but arbitration's privacy.[25] But a dispute does not have to be settled by arbitration; it may be settled by agreement at any time, and quite often is, just when the parties are ready to come to the captain's table of arbitration. One of a panel member's more frequent frustrations is to set time aside for an arbitration hearing and then be notified, 24 hours in advance, that the parties have settled. Frankly, it is a pleasant frustration. No statistics are or ever will be available as to how many licenses,—or to pose a truly esoteric inquiry, how many decisions not to breach contracts, infringe patents, or file in interference,—are in fact a tacit agreement to settle. It is not a good reply to propose that all arbitrations[26] should be conducted subject to notice to and entry by the Government, or even that all patent agreements of every kind should be recorded,[27] wholly aside from the extremely serious problems of political economy which such propositions necessarily entail. The point of confusion appears to be a feeling that patents, which are personal property, should be converted into continuously inspected and supervised public utilities.

Secondly, and proceeding from this worry about privacy, is a tacit or expressed concern as to whether arbitration can be used to preserve or create an illegal patent relationship, e.g., one which violates the anti-trust laws. In this, which is probably the true field for public policy, the answer is very clear. Arbitration cannot be used to make lawful what is unlawful.

As a matter of general public policy, certain fields of subject-matter are closed to arbitration by statute or decision. In New York arbitration may not resolve controversies where the claim is to an estate in real property in fee or for life,[28] nor can infants or incompetents be parties to an arbitration without court consent.[29] As a matter of judicially construed policy, the custody of children and the right to visit them cannot be decided by arbitration.[30] It

25. Actually, few arbitration awards, in this field at least, remain secret very long. The Association and arbitrators never reveal them, but trade gossip puts together the *general* result, from snatches gleaned from parties and counsel, and from trade effects, with surprising rapidity and accuracy.
26. Kronstein, Business Arbitration—Instrument of Private Government, 54 Yale L.J. 36 (1944).
27. American Patent System, *supra* note 12, Report, at 30, item 5.
28. N.Y.C.P.A., sec. 1448 (2).
29. N.Y.C.P.A., sec. 1448 (1).
30. *Matter of Hill*, 199 Misc. 1035, 104 N.Y.S. 2d 755 (Supr. N.Y., 1951); *Matter of Michelman*, 135 N.Y.S. 2d 608 (Supr. N.Y., 1954).

is probable that, to the extent the courts extend a special tutelage, these exceptions will grow.

But genuine public policy, concern that violation of the laws not be permitted, goes further than this. The party to an arbitration who honestly believes that the intention or the effect of the arbitration is either to further or to work a violation of prohibitory law has his judicial remedies to hand, the motion to stay or the motion to vacate an award, on that express ground.[31]

Applying this to the fortunes of Mr. Corbett and International Gondoleon, what happens? Let us assume that one of them decides to go to arbitration.

There are seven areas where one can invoke a dimmish shade of moralistic "public policy":

(1) The possibility that an erroneous award might be rendered, generally or in particular. But arbitrators have no monopoly on error, nor courts on non-error. At most one can argue that the availability of an appeal in a judicial trial is corrective of error, *to an extent*. And, unless the erroneous result adversely affects or binds the public, willingness to accept an undemonstrable and quite possibly non-existent greater chance of error is the parties' own affair.

(2) The argument, already discussed, that patents are so peculiar a phenomenon that all activities touching them should be public, or at least open to inquiry by the general public.

(3) The argument, already discussed, that *any* exercise of the power of decision respecting patents should be judicial, or "supervised."

(4) The contention that a court might be more likely to order International Gondoleon to greater efforts, or alternatively declare the contract breached, so permitting Corbett to try to license his patents to a hypothetical other firm which might do a better or quicker job of commercial reduction to practice, and the conclusion that this would be in the public interest.

(5) A loose feeling, not often frankly expressed, that a court would be less friendly to patents and to business than a board of arbitration would, and that in some way this is "bene-

31. *Matter of Western Union Telegraph Co.*, 299 N.Y. 177, 86 N.E. 2d 162 (1949).

ficial to the public." This and the preceding contention, *if* justified, are matters for legislation.

(6) A more specific argument that, so long as Corbett "feels" there is a "chance" of a cartel arrangement in Europe, neither he nor International should be permitted by private arbitration to withhold knowledge of it from the public in its various aspects.

(7) Another more specific argument that if Corbett "feels" there is the "slightest chance" that International is going to shelve or not produce to the limit, he willy-nilly, and the public, must be protected from private arbitration.

These last two arguments are worth a little consideration. To begin with, Corbett is quite able to defend his interests if what International is doing or proposes to do is or would be illegal, for he has at hand his motions for stay or vacating an award. That would still be the case if an issue of interference or infringement were involved. Of course, he *might* conclude that a panel of arbitrators in whose selection he had an equal voice would not lightly aid or foment illegality. That, however, is not really the point, for the moralist would deny to Corbett the right to make his own decision in the interest of public policy. A philosopher might rather concern himself with the varied warnings of Hughes and Chesterton on the subject of liberty;[32] a cynic might say that there is witch-hunting *and* witch-hunting.

He might also say that there is very little to a public policy which would leave Corbett, against his will, to unnecessary expense and awaiting the vicissitudes of the *other* form of arbitration.

"And that old common arbitrator, Time,
Will one day end it."[33]

32. Hughes, C.E., Liberty and Law, 11 A.B.A. Journ. 563 (1925); Chesterton, G. K., The Horrible History of Jones (Collected Poems 148, Dodd Mead, New York 1932).
33. Troilus and Cressida, iv, 5.

ARBITRATION OF MARINE SALVAGE CLAIMS AT LLOYD'S

by Joseph A. Schimski
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A dramatic sea rescue by a passing cargo or passenger vessel may readily lend itself to bold headlines, but our merchant fleets depend on the few established marine salvage organizations for their day to day protection. Stationed strategically near the major sea lanes, these professional salvors maintain experienced personnel and special equipment in a constant state of readiness. Experience has shown all too clearly that prompt salvage assistance is essential lest the situation of a stricken vessel deteriorate beyond recovery.

The awards received by professional salvors for individual services must be sufficient to cover their direct expenses while actually engaged in salvage operations and their maintenance costs during periods of inactivity. While the admiralty courts are readily available to salvage claimants, the leading marine salvors have most often reverted to other means for effective determination of their awards, i.e. negotiation[1] or arbitration. In certain situations, admiralty jurisdiction (for the most part dependent on the location of the vessel or "res") may not be available for presentation of the salvor's just claims or, if jurisidiction can be obtained, calendar congestion may seriously delay a hearing on the merits and the resulting award. Further, the numerous courts of admiralty jurisdiction have not been altogether consistent in their evaluation of claims for salvage services. Whatever surface appeal an occasional excessive award by an admiralty court may have, established salvors realize that their best interests are served by referral to those more experienced in salvage matters and mindful of the salvor's special problems.

For their part, the vessel and cargo interests are primarily concerned with avoiding excessive salvage awards. However, the leading marine underwriting fraternities, with enormous vessel and cargo

1. In the United States, by referral in some instances to the Salvage Awards Advisory Committee of the Board of Underwriters of New York, a panel of representatives of leading marine underwriters who consider the salvor's claim and recommend a settlement to the parties without force of law.

values at risk throughout the world, also recognize the absolute need for adequate awards if the salvors are to continue their valuable service.

Within this framework, the Lloyd's standard form of "No Cure-No Pay" salvage agreement and the somewhat unique arbitration proceeding provided thereby have proved particularly effective. Sponsored by the Committee of Lloyd's,[2] it is usually referred to as "Lloyd's Form." Since it first became available for general use in 1892,[3] this agreement has received increasingly wide acceptance by the marine industry.[4]

The Agreement

In essence, the salvage agreement provides that the salvor will use his best endeavors to salve the stricken vessel and her cargo, and deliver them to an agreed location of safety. If successful, the salvor's remuneration is to be determined by arbitration in London under prescribed rules. As the terms "No Cure—No Pay" imply, if the salvor fails to save any of the property in peril, he receives no compensation for his effort and expense.

This agreement is not suitable to every type of salvage situation. At times the vessel may be in such a perilous condition or position that the salvors have little hope of ultimate success, but the vessel and cargo interests may nevertheless wish to proceed with salvage operations because of the high values at risk or other circumstances. Here, the parties may arrange that the salvor shall be reimbursed at an agreed daily rate for his personnel, vessel and equipment, regardless of ultimate success. In salvage parlance, this is referred to as a "Per Diem" agreement and provision for arbitration of disputes is sometimes included.

It may happen that the parties do not know and cannot readily ascertain the precise condition of the vessel and her cargo so as to select an appropriate type of agreement. The vessel and cargo interests may urge the salvor to dispatch a salvage vessel immediately under an arrangement whereby the salvor is paid an agreed daily

2. The Committee consists of representatives of the leading underwriters who form the Society of Lloyd's. They direct the corporate affairs of the Society as distinguished from the individual underwriting businesses of the members.
3. It was preceded by forms of more limited applicability dealing with salvage in the Dardanelles and for use by the International Salvage Unions.
4. Periodic modifications have added to its effectiveness; in December, 1924, interest on awards was first introduced and in October, 1926, provision was made for appeal of awards.

rate while proceeding to the scene of operations and if salvage is not attempted, while returning therefrom. This provision is called a "Voyage Guarantee." Once on the scene, the parties are free to enter whatever type of agreement the circumstancs may indicate. A number of possible variations and combinations of these basic agreements often result from the parties' negotiations.

The relationships existing between the parties interested in a stricken vessel and her cargo bear special comment. The traditional position of the vessel master as an agent with extraordinary powers in relation to the vessel and cargo still remains although, as a practical matter, modern systems of communication have facilitated more direct intervention by the vessel owners. Under legal principles of general average, the vessel owners may be entitled to contribution by the cargo interests for salvage and certain other expenditures directed to the safety of the entire venture. Conversely, the owners of cargo jettisoned for the intended protection of the vessel and remaining cargo may be entitled to reimbursement from those interests to be benefited. As a practical matter, vessel owners generally request hull insurers to participate in decisions affecting salvage and related matters. The owners are understandably interested in securing reinbursement for salvage and repair costs within the terms of their policy. Where the vessel and her cargo become an actual or constructive[5] total loss and abandonment by the owners has been accepted by the underwriters, the latter will be, in fact, the only remaining parties in interest.

The Salvage Operation

Strandings[6] are probably the most frequent marine casualties requring expert salvage assistance. While the basic techniques used in refloating a stranded vessel are relatively simple to understand, their execution in and around the restricted areas about a stranded vessel under difficult conditions of tide and weather can be extremely hazardous and call for seamanship of the highest order. Be-

5. Winter on Marine Insurance, Second Edition Pg. 355; Where the property has not actually become a total loss, but has been so injured that the part or remnant is impossible of repair at a cost less than the value of the repaired subject, or if not badly injured, is in a position of such difficulty from the viewpoint of salvage that the cost of recovering it would equal or exceed its value where recovered.

6. DeKerchove, International Maritime Dictionary Pg. 735; Stranding occurs when a ship takes the ground (beach shoal or sea bottom) not in the ordinary course of navigation but by accident or the force of wind or sea, and remains stationary for some time.

cause of the many intangibles involved, selection of the proper technique to fit a given salvage situation requires a combination of skill and intuition born of years of actual salvage experience. A prime illustration of the need for sound judgment sometimes arises while the master is attempting to free the vessel prior to the arrival or engagement of experienced salvors. By off-loading or jettisoning cargo, the master may obtain adequate buoyancy to allow reflotation. On the other hand, this course of action may only cause the vessel to be driven further aground thereby rendering her ultimate salvage more difficult and expensive.

Many factors will be considered by an arbitrator in determining his award. The most important are (1) the degree of peril from which the stricken vessel and her cargo were rescued, (2) the hazards faced by the salvage vessel and her crew and the efficiency of their operations, (3) the expenses incurred by the salvor in effecting salvage and the value of his property at risk and (4) the value of the vessel and/or cargo saved. This latter value is commonly referred to as "salved value" and will be discussed hereafter in greater detail.

Security Arrangements

In most other arbitration proceedings, the question of enforcement of the award does not become pertinent until after the arbitrator's decision. However, such complacence would often be fatal to a salvor in view of the distant and scattered domiciles of shipowners and the possibility of subsequent loss of the salved vessel. In recognition of this situation, the salvage agreement expressly provides that security covering the salvor's anticipated award must be posted with the Committee of Lloyd's by the owners of the salved property within a specified time. Further, the salvor may require security in such amount as he alone believes warranted by the services. However, unrealistic demands by the salvor are discouraged since the arbitrator is expressly empowered to charge the salvor in whole or in part for the expense of providing excessive security. Although the Committee is given absolute discretion as to the manner and form of security, the agreement absolves the Committee of responsibility for insufficiency or other failure of such security.

Pending completion of security by the owners, the salvor retains a maritime lien on the property salved and the owners agree not to remove such property from the place to which it has been taken without the salvor's written consent. The salvor, for his part, agrees

not to arrest or detain the salved property unless security is not posted within 14 days of termination of his services or unless he has reason to believe that improper removal is contemplated.

Under appropriate circumstances, the salvor will accept a letter of credit on a local bank or an underwriters' written undertaking to pay the salvage award in lieu of actual posting with the Committee.

Where it has become necessary for the salvor to assert his maritime lien in the admiralty court, it does not necessarily follow that the arbitrator's jurisdiction is thereby divested. In a recent case,[7] the court held that the Lloyd's salvage agreement contemplated alternate forms of security, i.e. posting with Lloyd's or the proceeds of a judicial sale of the salved property. Despite the shipowner's refusal to post security, the salvor's action in the United States District Court was stayed pending and subject to arbitration at Lloyd's.

The primary purpose of security is to insure payment of the salvor's award. Moreover, if none of the parties demand arbitration within 42 days of completion of security, the amount so posted may be remitted to the salvor in full payment for his services.

The Arbitrators and Counsel

As real parties in interest, the salvor, the owners and underwriters of the salved vessel, and the owners of a substantial amount of the cargo may demand arbitration. The Committee of Lloyd's may also demand arbitration, even if none of the real parties in interest do so.

As will be seen, the Committee is also given wide powers in the selection of arbitrators and may, under certain circumstances, fix the award themselves without reference to outside arbitrators. In practice, the Committee rarely, if ever, exercises these powers and has voluntarily limited its activities to administration of the arbitration proceedings. Nevertheless, the mere existence of such powers may seem somewhat unusual to those who take a more partisan view of arbitration when it is understood that the Committee consists of representatives of the leading underwriters who may and often do have a sizeable financial interest in the ultimate salvage award. Notwithstanding, the Lloyd's form and arbitration proceedings have earned the confidence of professional salvors which is a tribute to the manner in which the proceedings have been conducted.

7. The GEORGIANA, 119 Fed. Supp. 366, 1954 A.M.C. 377.

Following demand for arbitration, the salvor has two options as to the selection of arbitrators. Most frequently, the salvor will leave the matter to the discretion of the Committee, either to fix the salvor's remuneration themselves or, as is almost always done, to appoint a sole arbitrator. However, the salvor does have the right to appoint an arbitrator on his own behalf, in which event, the parties interested in the salved property may do likewise. If these two arbitrators cannot agree, the Committee or its nominee may act as umpire and render the award. If the vessel and cargo interests do not name their own arbitrator, the Committee may do so for them, or may direct the salvor's nominee to act as sole arbitrator. Only the salvor may initiate selection of his own arbitrator; where the salvor does not exercise this right, the vessel and cargo interests are presumed agreeable to the Committee's selection.

Arbitrators are generally selected from a panel which, at the present time, consists of four senior Queens Counsel practicing at the English Admiralty Bar. It is interesting to note that, in selecting "Barrister-Counsel" to represent them at the arbitration, the owners and salvors most often select other members of the same panel except, of course, the member already chosen to act as arbitrator. It is not unusual, therefore, that a member of the panel will act as sole arbitrator in one case, represent the shipowner in another and represent the salvor in a third. However, the parties or the Committee are not restricted to members of the panel in their selection and other Counsel practicing at the Admiralty Bar are sometimes chosen.

Documents

Oral evidence, while admissable at the arbitration hearing, is not customary, and accordingly the documents offered by the parties play a vital role in the decision of the arbitrator. The salvor will usually submit affidavits and reports setting forth (1) a description of his operations and the perils and difficulties encountered, (2) his costs, (3) valuations of his property at risk and (4) such other pertinent information as will assist the arbitrator. The shipowners have the right of written reply although this is rarely exercised.

The shipowners put forward a statement of the "salved value," i.e. the value of the property saved at the place where, and at the time when, the salvage service terminates. This is a true measure of the actual benefit the owners derive from the salvor's services and essential to the arbitrator's decision. Under a generally accepted ap-

proach, "salved value" is considered as the appraised sound value of the vessel prior to the accident, less the estimated or actual cost of repairs, plus the value of cargo saved. To this may be added the freight monies at risk, if any, less any expenses which the shipowner is obliged to incur under his contract of affreightment in order that he might be entitled to any freight monies at all. The cost of towing the salved vessel from the scene of the casualty to the place of repair and other towage costs may, under appropriate circumstances, constitute a deduction from salved value. The arbitrator's determination of "salved value" is rarely put forward as an exact figure in the award.

Value of Salved Property

Contrary to popular opinion on the subject, a professional salvor's awards are usually quite moderate in relation to the values saved by his services. While arbitrators will avoid determination of the salvage award as a percentage of the "salved value", such comparison is natural to the parties. When the value of property saved is high and the services rendered are routine, this percentage may be 5% or lower. Conversely, situations may arise in which the salvor, through highly meritorious but relatively expensive services, is able to save low vessel and cargo values which would otherwise have been totally and irretrievably lost. The salvor undoubtedly is entitled to adequate reimbursement for his efforts, even though his award may constitute a large percentage of the residual values. On the other hand, the vessel and cargo interests who ultimately pay the salvor's award are entitled to a reasonable return. The problem posed is a difficult one and is rarely decided to the entire satisfaction of all parties.

In view of the importance of "salved value," the salvor is afforded full opportunity to submit his own written and oral evidence on this subject.

Counsel for the parties will usually exchange in advance the documents they intend to present at the hearing. This is not mandatory under the salvage agreement but has proved advantageous to all concerned and is in line with English court practices. Such exchange of documents has promoted many pre-hearing settlements which might otherwise never have been consummated. It has also contributed to more expeditious and productive hearings in that Counsel are thereby better prepared to present orderly and effective arguments. In practice, this exchange is often conditioned on the understanding

that opposing Counsel will not refer to the documents at the hearing unless and until they are offered before the arbitrator by their proponents.

The Hearing

The arbitration hearings are conducted quite informally, although the procedure of the British courts is followed in the order of presentation of evidence. In addition to the arbitrator and "Barrister-Counsel" representing each party, the solicitors for the parties can and usually do attend, except that in accordance with English practice they have no right of audience. The interested parties rarely attend unless they are to be called as witnesses.

Counsel for the salvor opens with a statement of the main points of his client's case, a summary of his written evidence and examination of any witnesses he may have called to give oral evidence. Counsel for the respondent owners has the right to cross-examine, and in due course he will also summarize his own written evidence and examine his witnesses. After Counsel for the salvor has cross-examined, Counsel for each party may summarize the evidence. The salvor's Counsel is given the privilege of opening this summation and replying to his adversary's summation.

The arbitrator may also, in his own discretion, call for expert testimony on the matters under consideration.

The Committee considers each award as private and, hence, does not publish any reports or statistics. However, the arbitrators have access to prior awards and information relating thereto, and they generally refer to these records for guidance. Of particular interest is the practice that neither party suggests an appropriate award to the arbitrator. Until he has actually determined the amount of his award, the arbitrator will have no knowledge of the amount of security demanded by the salvor or of any tenders in settlement by the respondent owners.

The Award

An award, in writing and signed by the arbitrator, is usually forthcoming within a few weeks of the hearing on the merits. The costs of the arbitration proceeding, including the fees of the arbitrator and the Committee, are generally assessed against the respondent owners in the absence of a prior formal tender in settlement to the salvors equal to or in excess of the final award. As previously

noted, the award may also provide that the salvor bear the cost of excessive security.

The "reasons" assigned by the arbitrator for his award are prepared separately and made available to the parties. A brief review of the salvage operation and other pertinent facts are usually included.

Appeals

The salvage agreement permits the right of appeal and cross-appeal to each of the parties. Although the Committee is authorized to hear and determine such appeal, it is the usual practice to appoint a single appeal arbitrator. Consideration is given to the evidence and documents adduced at the original arbitration and the prior arbitrator's notes. However, the appeal arbitrator may, in his sole discretion, call for other evidence.

The salvage agreement specifically states that the award on appeal shall be final and binding on all parties. However, despite this wording, court review of the arbitrator's award may be had in certain limited circumstances. The English arbitration statutes are incorporated by reference into the agreement and, under these statutes, the courts have the power to set aside an award where the arbitrator has misconducted the proceedings or where the arbitrator lacked jurisdiction in the first instance. Further, the courts have the inherent power to set aside an award which is improper on its face, either as involving an apparent error in fact or law[8] or as not complying with the requirements of finality and certainty.

Comments

The surest test of any type of arbitration proceeding is the respect and confidence of those interested in its decisions. The marine industry has more than amply demonstrated such confidence and respect by extensive use of the Lloyd's Form. Although the Society of Lloyd's does not publish statistics on the subject, it is unofficially estimated that arbitrators are appointed in 150 to 200 cases annually. This estimate does not include cases involving services performed under the Lloyd's form which are settled before appointment of an arbitrator.

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8. In the KAFIRISTAN, (H. L.) 58 Ll. L. Rep. 317; (1938) A.C. 136; the House of Lords, in reversing the Lloyd's arbitrator and the Court of Appeal, held that the salvor was not disentitled to an award merely because another vessel of the salvor had collided with the salved vessel thereby rendering the salvage services necessary.

MARINE SALVAGE CLAIMS AT LLOYD'S

There is no single comprehensive tabulation of salvage awards rendered by admiralty courts throughout the world. The editors of the American Maritime Cases list salvage awards reported in United States and territorial courts for each five year period. The most recent summary covering the years 1948 to 1952 inclusive records 46 salvage awards. Almost all of these involve casual as distinguished from professional salvors, disputes as to crew participation in awards and wartime incidents of salvage. Similarly, the Lloyd's List Law Reports list salvage awards reported in the courts of Great Britain and some Commonwealth countries. Of the 14 awards reported in the years 1951 through 1955 inclusive, none involve professional salvors.

It is not suggested that the salvors and the vessel and cargo interests are satisfied with each and every award. Nevertheless, the Committee and its arbitrators have maintained an intelligent and realistic approach to the problems of marine salvage with the result that the Lloyd's "No Cure-No Pay" salvage agreement has become a basic tool of the marine industry.

READINGS IN ARBITRATION

Articles and Notes in Legal Periodicals

Symposium on Arbitration. Vanderbilt Law Review, June 1957 (Volume 10, No. 4). The entire issue is devoted to articles on arbitration in the United States, with particular reference to the role of lawyers in the process. The foreword, by Sylvan Gotshal, Chairman of the Board, American Arbitration Association, describes the historical setting for the present renewed interest on the part of lawyers in the arbitration process. He cites figures showing the extent of lawyer participation in AAA tribunal activities and lists seven areas in which attorneys put their special skills at the disposal of clients in arbitration. Other articles include "The Nature of the Arbitration Process," by William M. Hepburn and Pierre R. Loiseaux; "Some Comments on the Uniform Arbitration Act," by Maynard E. Pirsig, and a dissenting view, "The Proposed Uniform Arbitration Act Should Not Be Adopted" by Alexander Hamilton Frey; "Some Procedural Problems in Arbitration," by Benjamin Aaron; "Drafting of Grievance and Arbitration Articles of Collective Bargaining Agreements," by Charles A. Reynard; "Collective Bargaining, Labor Arbitration and the Lawyer," by Nathan P. Feinsinger; "Informing the Arbitrator," by Robert L. Howard; "A Labor Arbitrator Views His Work," by Maurice H. Merrill; "A Lawyer's View of Labor Arbitration," by George E. Strong; "Preparation and Presentation of an Arbitration Case," by Joseph S. Murphy; and "Vacation of Awards for Fraud, Bias, Misconduct and Partiality," by Alan H. Rothstein.

Arbitration of no-strike clause breaches: an answer to section 301 *of the Taft-Hartley Act,* 31 Ind. L. J. 473 (1956).

The Constitutional Basis of Erie and the Scope of the Arbitration Act (Bernhardt v. Polygraphic Company of America, 350 *U.S.* 198), 70 Harv. L. Rev. 137-141 (1956).

Enforceability of Arbitration Agreements under Taft-Hartley Section 301. By Allan I. Mendelsohn, 66 Yale L. J. 167-202 (1956).

Constitutional Law—Compulsory Arbitration—Arbitrator's Fees as Condition Precedent to Appeal and Trial De Novo, as a Denial of Trial by Jury [*Smith Case,* 381 *Pa.* 223], 31 N.Y.U. L. Rev. 1316-1319 (1956).

Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems. By Bernard Dunau, 57 Columbia L. Rev. 52-82 (1957).

The Enforcement of Collective Bargaining Agreements by Arbitration in Louisiana. By Alvin B. Rubin, 17 Louisiana L. Rev. 1-26 (1956).

Federal Arbitration Act Does not Give Federal Court Power to Enforce Provision in Collective Bargaining Agreement to Arbitrate Terms of New Contract [*Printing Pressmen's Union v. Potter Press,* 141 *F. Supp.* 553], 70 Harv. L. Rev. 365-367 (1956).

The Function of the Courts in Arbitration. By Herbert A. Lien, 136 N.Y.L.J. No. 124, Dec. 31, 1956, p. 4 col. 1; 137 N.Y.L.J. No. 1, Jan. 2, 1957, p. 4 col. 1.

Judicial Supervision [*of arbitration*] *Prior to Hearing,* in Alfred W. Blumrosen, Labor Law, 11 Rutgers L. Rev. 171, 184-189 (1956).

Trial—Compulsory Arbitration—Conditions on Right to Civil Jury [*Smith Case,* 381 *Pa.* 223], 40 Minnesota L. Rev. 280-283 (1956).

"No Strike" Clauses implied from Arbitration Agreements: Application to Strikes Against Unfair Labor Practices, 66 Yale L. J. 282-292 (1956).

Preliminary 'trials' in arbitration. By S. S. Tripp, 19 Queens Bar Bull. 136 (1956).

Restraining Effects of the Final Judgment Rule on the Arbitration Process, 66 Yale L. J. 293-302 (1956).

Time Limits For An Arbitration Award in Connecticut. By Jay S. Siegel, 30 Conn. Bar J. 360-369 (1956).

Three Centuries of Commercial Arbitration in New York: A Brief Survey. By William Catron Jones, 1956 Washington University Law Quarterly 193-221 (1956).

Extra-Judicial Settlement of Insurance Claims. By Edward M. Fuller, Insurance Law Journal, December 1956, pages 816-822.

Effect of Vacancy Through Resignation, Withdrawal, Or Death of One of Multiple Arbitrators on Authority of Remaining Arbitrators to render Award (*annotation to Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL, v. The Connecticut Co.,* 142 *Conn.* 186, 112 *A.* 2*d* 501), 49 Am. Law Reports Annot. 2d p. 900-917 (1956).

Conclusiveness of statement or decision of accountant or similar third person under contract between others requiring property to be valued by him (*annotation to Brennan v. Brennan,* 57 *Ohio Ops.* 71, 120 *N.E.* 2*d* 89), 50 Am. Law Reports Annot. 2d p. 1268-1274 (1956).

The Trial of a Labor Arbitration. By David L. Benetar. The Practical Lawyer, vol. 2 No. 6 (Oct. 1956) p. 34-41.

Federal District Court May Issue Mandatory Injunction to Enforce Arbitration Clause of Collective Bargaining Agreement (*Local* 19, *Warehouse Workers Union v. Buckeye Cotton Oil Co.,* 38 *L.R.R.M.* 2590), 42 Va. L. Rev. 1151-1154 (1956).

Labor Arbitration Clauses: Draftsmanship Avoids Litigation. By Francis V. Lowden, Jr., 43 Va. L. Rev. 197-210 (1957).

Jurisdiction: Specific Performance of an Agreement to Arbitrate (*Local* 205, *United Electrical Workers v. General Electric Co.,* 223 *F.* 2*d* 85), 4 University of California Los Angeles L. Rev. 142-147 (1957).

Breach of Collective Bargaining Contract held within Arbitrators' Jurisdiction though also an Unfair Labor Practice (*United Electrical Workers v. Worthington Corp.,* 236 F. 2d 364), 35 Texas L. Rev. 275-279 (1956).

Some Comments on Arbitration in the Newspaper Industry, by Howard J. Brown, 34 Journalism Quarterly 19-30 (1957).

Arbitrators' Ex Parte Consultations and Investigations, 44 Cal. L. Rev. 899-908 (1956).

Federal Jurisdiction: Determination of State Law in Federal Courts in Diversity Action (*Bernhardt v. Polygraphic Co.,* 350 U.S. 998), 45 Cal. L. Rev. 87-90 (1957).

Labor Law: Do Statutes Authorize Federal Courts to Decree Specific Performance of Arbitration Covenants in Collective Bargaining Contracts? Conflicting Interpretations of Legislation in Recent Decisions, 42 Cornell L. Q. 425-433 (1957).

Rights of Individual Workers in Union-Management Arbitration Proceedings (In the Matter of Iroquois Beverage Corp., 159 N.Y.S. 2d 256), 66 Yale L. J. 946-954 (1957).

Effect of a breach of contract by the party seeking to arbitrate on the duty of the other party to arbitrate, 8 Syracuse L. Rev. 243-247 (1957).

Arbitration or appraisement?, 8 Syracuse L. Rev. 205-211 (1957).

The Government's Role in Arbitration, by George E. Strong. 24 Journal of the Bar Association of the District of Columbia, 292-295 (1957).

Arbitration, by Martin Domke. 1956 Annual Survey of American Law, 350-357 (1957).

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *The Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

ASSIGNEE OF CHARTER PARTY MAY AVAIL HIMSELF OF ARBITRATION PROVISION CONTAINED IN CONTRACT. Said the court: "The law is now well established in this jurisdiction [New York] that the assignee of a contract, which is not of a personal nature, may avail himself of the right of arbitration contained in the contract, and that this rule is applicable to assignees of charter of vessels." *Instituto Cubano de Estabilizacion del Azucar v. The M V Driller,* 148 F. Supp. 739 (S.D. N.Y., Dawson, D. J.).

EMPLOYEE MAY NOT RECOVER DAMAGES FROM UNION FOR LATTER'S FAILURE TO BRING DISCHARGE GRIEVANCE TO ARBITRATION inasmuch as there is no agreement between the employee and the union in the contract, in the constitution or in the employee's application for membership which requires the union to proceed. In confirming a decision (*Arb. J.* 1956, p. 166), the California District Court of Appeal quoted from the New York decision of *Bianculli v. Brooklyn Union Gas Co.,* 115 N.Y.S. 2d 715 (*Arb. J.* 1952, p. 173): "The philosophy of the Union in retaining control over disputes and of the Company in requiring the same is sound. A contrary procedure which would allow each individual employee to overrule and supersede the governing body of a Union would create a condition of disorder and instability which would be disastrous to labor as well as industry." *Terrell v. Local Lodge 758, Int'l Assoc. of Machinists,* 28 LA 418 (Vallee, J.).

COURT WILL NOT DIRECT ARBITRATION ON ORAL CONTRACT, CONFIRMED BY LETTER, WHICH CONTAINED NO ARBITRATION CLAUSE, particularly where parties were familiar with standard form contract approved by the Screen Actors' Guild which provides for arbitration of disputes between actors and producers. Said the court: "Since I find no provision in the contract of December 5, 1953 nor even in that of December 8, 1953, unmistakably indicating an intention of plaintiff to arbitrate any disputes which might arise between them, they must be relegated to the courts for determination." *Havoc v. Charles Antell, Inc.,* 159 N.Y.S. 2d 774 (Lupiano, J.).

VIRGINIA SUPREME COURT OF APPEALS WILL NOT CONFIRM AWARD UNDER COMMON LAW WHERE ONE PARTY SIGNING SUBMISSION DIED PRIOR TO HEARINGS. An attorney and a client submitted a claim for a professional fee to a named arbitrator. Three days before the date set for the hearing, the client died. His daughter, the administratrix of the estate, appeared at a postponed hearing without taking part in the proceedings, and an award was rendered for the full amount claimed by the attorney ($3,000). A judgment confirming the award was reversed by a majority opinion of the Supreme Court of Appeals of Virginia, since a common law arbitration agreement is "terminated by operation of law, which occurs upon the death of a party to the agreement . . . [which] revokes the agreement and the authority of the arbitrator to act thereunder for the deceased party or his estate . . . unless there is an explicit stipulation that the submission shall survive or shall not be revoked by the death of either of the parties," referring to *Aldrich v. Aldrich,* 260 Ill. App. 333. The court further stated that the arbitrator's authority revoked by the death of the party "could not be restored by a mere waiver of the administratrix. She could have empowered the arbitrator to act for her decedent's estate by entering into a new submission agreement" with the petitioner-attorney. *King v. Beale,* 198 Va. 802, 96 S. E. 2d 765 (Eggleston, J.).

INDIVIDUAL EMPLOYEE MAY NOT CHALLENGE AWARD UPHOLDING HIS DISCHARGE where the company and union have participated in arbitration. An employee's action against an employer for wrongful discharge was dismissed, where the discharge was upheld by an arbitrator. Said the Sixth Circuit Court of Appeals: "Although an agreement to arbitrate a dispute may be invalid and an arbitrator's award cannot be enforced against one who has withdrawn from the agreement while it is still executory [under the law of Tennessee here applicable], it is settled law that where the parties have executed the arbitration agreement by proceeding with the arbitration and obtaining an award, the award is binding, subject to attack for fraud or some vitiating defect in the proceedings. No such attack is made here." The court therefore affirmed a judgment dismissing the claim. *Grant v. Atlas Powder Co.,* 241 F. 2d 715 (Ct. of App. Sixth Cir.).

II. THE ARBITRABLE ISSUE

DISPUTE OVER PERFORMANCE OF A CONSTRUCTION CONTRACT IS ARBITRABLE EVEN AFTER EXPIRATION OF THE CONTRACT, in view of the arbitration clause covering "any dispute or difference arising under this contract." Replying to one party's contention that the other had waived performance of the contract by accepting a compromise, the court said: "Whether there is an accord and satisfaction ordinarily involves a question of intention and is, as a rule, a question of fact. . . . All of the issues including those presented by petitioner as to the waiver of further performance and the alleged adjustment by respondent's acceptance of an amount as a credit are issues which must be determined by the arbitrators." *Martirano v. Feldman, N.Y.L.J.,* March 21, 1957, p. 13, Bailey, J.

COURT OF APPEALS DIRECTS ARBITRATION OF DISPUTES OVER SEVERANCE AND VACATION PAY under a clause referring to "any dispute, claim, grievance or difference arising out of or relating to this agreement." Whether a strike constituted a breach of the no-strike clause in the contract was deemed irrelevant by the Court, which said: "In a proceeding to compel arbitration the question for the court to pass upon is whether the written contract provides for arbitration and, if so, whether there was a failure to proceed with the obligation to arbitrate (*Kahn v. National City Bank,* 284 N.Y. 515). The question of performance goes to the merits and is a matter for the arbitrators whenever it appears that the parties have so consented (*Lipman v. Haeuser Shellac Co.,* 289 N.Y. 76, rearg. den. 289 N.Y. 647); and when such consent is given, the courts of New York will give it effect (*River Brand Rice Mills v. Latrobe Brewing Co.,* 305 N.Y. 36)." The court further stated in its majority opinion affirming the decision of the Appellate Division, which had directed arbitration, that "the issue is not whether petitioner [the union] is right, but whether it is entitled to have the issues determined in the forum designated in the agreement . . . by arbitration, a remedy which they primarily and exclusively placed within the jurisdiction of the arbitral tribunal." *Potoker, as Secretary-Treasurer of Newspaper Guild of New York, Local 3, ANG, CIO v. Brooklyn Eagle, Inc.,* 2 N.Y. 2d 553, 161 N.Y.S. 2d 609 (Dye, J.).

DISPUTE OVER CLOSING OF PLANT AND TRANSFERRING OPERATIONS TO TWO OTHER STATES WHERE WORK WOULD BE PERFORMED BY SEPARATE CORPORATIONS BUT UNDER THE DIRECTION OF THE EMPLOYER IS ARBITRABLE under provisions of an agreement prohibiting transfer of work when employees were not working full time. The Court of Appeals held that such controversies involving "interpretation and application of the agreement" are for the arbitrators to decide, not for the courts (*Matter of Teschner,* 309 N.Y. 972; *Matter of Compagnie Francaise des Petroles,* 305 N.Y. 588), and an order denying a motion to stay the arbitration (see *Arb. J.* 1956 p. 164) was affirmed. *Acme Backing Corp. v. Dist. 65,* DPOWA, 2 N.Y. 2d 963.

CLAIM OF FRAUD IN INDUCING CONTRACT IS ARBITRABLE WHERE PARTY MAKING THAT CLAIM FAILED TO RESCIND THE CONTRACT and elected to recognize the contract and claim damages for the fraud. The court therefore found no question as to the existence of the contract which would allow a stay of arbitration. *Amerotron Corp. v. Maxwell Shapiro Woolen Co.,* 162 N.Y.S. 2d 214 (App. Div., First Dept.).

ISSUES ARISING IN A STOCKHOLDER'S DERIVATIVE SUIT FOR ALLEGED MISCONDUCT OF CORPORATE OFFICERS AND DIRECTORS ARE NOT ARBITRABLE, the court holding arbitration of such matters to be contrary to public policy (*Lumsden v. Lumsden Bros. & Taylor,* 242 App. Div. 852; *Matter of Diamond,* 80 N.Y.S. 2d 465, 467). *Pfeiffer v. Berke,* 4 Misc. 2d 918 (Supreme Ct., Special Term, Kings County, Charles E. Murphy, J.).

DISPUTE OVER WHETHER WAGE INCREASES GRANTED TO EMPLOYEES TRANSFERRED FROM NEW YORK TO UTAH WERE "MERIT" INCREASES IS ARBITRABLE despite contract provision that merit increases were to be given solely at the discretion of the company. Inasmuch as a question of contract interpretation was presented, the employer was directed to arbitrate under sec. 4 of the Federal Arbitration Act. *Engineers Assoc. v. Sperry Gyroscope Co.,* 148 F. Supp. 521 (S.D. N.Y., Edelstein, D. J.).

COURT WILL NOT STAY EMPLOYER'S ACTION AGAINST UNION FOR BREACH OF NO-STRIKE CLAUSE inasmuch as arbitration provision, covering "differences as to the meaning and application of this agreement," did not cover the right to strike. Said the Sixth Circuit: "The thing to be arbitrated is the 'difference' or 'grievance,' not the right to strike or any claimed justification for the strike. There was no right to strike. The arbitration called for by this paragraph of the contract was to be used instead of a strike, not to determine whether the strike was justified after it had occurred. The right to strike was not an arbitrable issue under this paragraph of the contract." The court further held that reference in the contract to "unsettled grievances" did not apply to violation of the no-strike clause, since "grievances" referred to complaints of an employee against the employer, not to "a grievance by the employer against the union." *Int'l Union, United Automobile Workers v. Benton Harbor Malleable Industries,* 242 F. 2d 536 (Shackelford Miller, Jr., C. J.).

CHARTER PARTY DISPUTE OVER SUBSTITUTION OF ONE SHIP FOR ANOTHER IS ARBITRABLE despite fact that correspondence relating to contract did not indicate the name of the shipowner. In holding that the shipowner was not deprived of his right to arbitrate, the court said: "Whether petitioner is the owner is a matter of proof to be presented to and determined by the arbitrators, who are to decide all other issues under the charter." *Dover Steamship Co. v. Summit Industrial Corp.,* 148 F. Supp. 206 (S.D. N.Y., Weinfeld, D.J.).

CLAIM FOR VACATION PAY WHICH RELATES TO TIME FOLLOWING EXPIRATION OF CONTRACT IS NOT ARBITRABLE. A collective bargaining agreement, providing for vacation pay for employees on the payroll as of April 15, expired on March 15, 1956 and was neither extended nor renewed. A claim for vacation pay in 1956 was therefore considered not arbitrable. In affirming its previous decision (*Arb. J.* 1956, p. 214), the court said it was "beyond dispute that the parties intended that vacation benefits should be paid only during the life of the contract. . . . Had a new contract been negotiated containing more generous vacation benefits I am quite sure these defendants would not contend that the vacation benefits contained in the old contract were to apply in the year 1956." *Botany Mills v. Textile Workers Union,* 28 LA 314 (N. J. Superior Ct., Chancery Div., Passaic County, Grimshaw, J.).

COURT WILL NOT DIRECT ARBITRATION WHERE THERE HAS BEEN NO VIOLATION OF UNAMBIGUOUS TERMS OF A COLLECTIVE BARGAINING AGREEMENT. The contract required vacation pay to be given to employees with twelve months' service. A claim was made for vacation pay for employees who had resigned long before completing the service requirement. The court, referring to the *Cutler-Hammer* case, 297 N.Y. 519, said: "If under the unambiguous terms of an agreement calling for arbitration, there has been no default, the court may not make an order compelling a party to proceed to arbitration." *Kipbea Baking Co. v. Bakery and Pastry Drivers and Helpers, Local 802, I.B.T., AFL-CIO,* N.Y.L.J., June 12, 1957, p. 8, Nathan, J.

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

ARBITRATION CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS ARE ENFORCEABLE UNDER SECTION 301(a) OF THE TAFT-HARTLEY ACT. The U. S. Supreme Court finally settled the much disputed question as to whether this provision merely gives Federal District Courts "jurisdiction," or whether this section permits enforcement of arbitration clauses in collective bargaining agreements, in controversies that involve unions in industries affecting commerce. The court held that this provision is more than jurisdictional in that "it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements. . . . Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." The Supreme Court, by a vote of 7 to 1 (Justice Frankfurter dissenting and Justice Black not participating), adopted the viewpoint of the dissenting opinion of the Fifth Circuit which was published in *Arb. J.* 1956, p. 21. *Textile Workers Union of Am. v. Lincoln Mills of Alabama; Goodall-Sanford v. United Textile Workers of Am., AFL, Local 1802; General Electric Co. v. Local 205, United Electrical, Radio and Machine Workers of Am. (UE),* Supreme Ct. of the U. S., June 3, 1957.

COURT DIRECTS ARBITRATION TO DETERMINE WHETHER "LIFTING" BY A SHIPOWNER OF LESS THAN THE 2,500,000 BOARD FEET OF LUMBER REQUIRED BY A CHARTER PARTY AGREEMENT CONSTITUTED BREACH OF CONTRACT. Shipowner sought to enjoin arbitration on the ground that the charterer had not yet suffered any damages and that there was not yet a dispute. In rejecting this contention, the court said: ". . . the issue of damages is one for proof. If the charterer is unable to prove damages that are not remote, conjectural or speculative, he will not recover." *J. E. Hurley Lumber Co. v. Compania Panemena Maritima San Gerassimo, S.A.,* 148 F. Supp. 144 (S.D. N.Y., Edelstein, D. J.).

PARTY MAY DEMAND ARBITRATION PURSUANT TO AAA CLAUSE WITHOUT SEEKING COURT ORDER DIRECTING ARBITRATION. The Supreme Court of New Jersey held that the New Jersey Arbitration Statute, 2A:24-3, which is identical with N.Y. C.P.A., section 1450, is "designed to afford a remedy where the terms of the arbitration agreement are such that its performance may be frustrated by the refusal of a party to proceed under it, as for example where a party refuses to designate an arbitrator and the agreement fails to provide machinery for going forward in that situation. In the words of the section, it is available 'where a party is aggrieved by the failure, neglect or refusal of another to perform under a written agreement.' It affords a remedy if one is needed. But when as here the agreement provides for the arbitration to proceed notwithstanding the refusal of a party to participate, nothing in our law requires the demandant in the arbitration to seek preliminarily an adjudication that he has the contractual right. The one who denies the existence of the contract may seek a judicial determination upon an application to stay the arbitration or upon a proceeding to enforce the award. If he chooses to ignore the arbitration and await an action upon the award, he takes the risk of a determination that he was obligated to arbitrate and hence is bound by the award." *Battle v. General Cellulose Co.*, 129 A. 2d 865 (Weintraub, J.).

COURT DIRECTS ARBITRATION OF DISCHARGES OF THREE EMPLOYEES, HOLDING SUCH DISCHARGES NOT WITHIN EXCLUSIVE JURISDICTION OF THE NLRB. Under a collective bargaining agreement which provided that "any employee disciplined or discharged by the company may use the above grievance steps, including arbitration, for hearing of his case," employees who were not reinstated after a strike had access to adequate means of relief without resort to the NLRB. The court's decision referred to the recent *Public Service Co.* case, 35 N. J. Super. 414, 114 A. 2d 443 (App. Div. 1955), and the *Ench Equipment* case, 43 N. J. Super. 500, 129 A. 2d 313 (App. Div. 1957; *Arb. J.* 1957 p. 54), whereby "the whole arbitration act aims to make an arbitration agreement a binding instrument and also to authorize the court to effectuate it, and hence to compel arbitration under the circumstances presented." *Public Utility Construction and Gas Appliance Workers of the State of New Jersey, Local No. 274, of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, AFL v. Public Service Electric and Gas Co.*, 130 A. 2d 421 (N. J. Super., Duffy, J.C.C.).

ARBITRATION MUST BE DEMANDED OF CORPORATE EMPLOYER, NOT CORPORATION OFFICERS OR STOCKHOLDERS AS INDIVIDUALS WHERE CONTRACT IS BETWEEN UNION AND CCRPORATION, despite the fact that the collective bargaining agreement provided for individual responsibility of officers and stockholders for compliance with the contract, especially those provisions relating to payment of wages. A motion to stay the arbitration against the individuals was therefore granted. *W & G Sewing Co. v. Local 221 of the Int'l Ladies' Garment Workers' Union*, N.Y.L.J., June 3, 1957, p. 13, Hill, J.

COURT ENJOINS SALE OF BUSINESS PENDING ARBITRATION IN ACCORDANCE WITH CLAUSE IN EMPLOYMENT CONTRACT giving one party the option to buy if the other party desired to sell. Interpreting the arbitration clause referring to "any controversy or claim arising out of or relating to this contract or the breach thereof," the court said: "Having contracted to arbitrate their differences the parties herein are bound thereby and such agreement must of necessity be enforced, and the parties having selected an exclusive remedy for the settlement of their disputes, they should be relegated solely to that remedy." *Diamond v. Dougfield, Inc.,* 159 N.Y.S. 2d 750 (Cone, J.).

COURT WILL NOT DIRECT ARBITRATION OF DISCHARGE WHERE COLLECTIVE BARGAINING AGREEMENT, ALTHOUGH PROVIDING FOR ARBITRATION OF ANY DISPUTES ARISING "IN THE APPLICATION OF ANY PROVISION OF THIS AGREEMENT, OR AS TO ANY FACTS CALLING FOR THE APPLICATION THEREOF," DID NOT SPECIFICALLY PROVIDE FOR ARBITRATION OF DISCHARGES OR OF "WORKING CONDITIONS." The court held that in principle it had jurisdiction to direct arbitration under the Taft-Hartley Act but that it could not do so in this case because the contract itself did not make the discharge arbitrable. *United Furniture Workers of America, AFL-CIO v. Little Rock Furniture Mfg. Co.,* 148 F. Supp. 129 (Ark., Trimble, D. J.).

COURT IN WISCONSIN WILL NOT STAY SUIT OF INDIVIDUAL EMPLOYEE AGAINST EMPLOYER FOR WRONGFUL DISCHARGE WHERE UNION DID NOT SUPPORT EMPLOYEE AND WHERE EMPLOYEE COULD NOT DEMAND ARBITRATION. A supporter of the CIO was discharged after trying unsuccessfully to oust an AFL union as bargaining agent. The Supreme Court of Wisconsin refused to bar the court action, referring to *Hudak v. Hornell Industries,* 304 N.Y. 207, where "the union did not champion his (employee's) cause and had no dispute with the employer, and where as here the individual employee could not demand arbitration as a matter of right." *Pattenge v. Wagner Iron Works,* 25 U.S. Law Week 2489, Wisconsin Supreme Ct., O'Meill, J.).

COURT WILL NOT STAY ACTION AT REQUEST OF A PARTY WHO ASSERTS AN ARBITRATION CLAUSE AS A DEFENSE AFTER THAT PARTY RESISTED ARBITRATION. A license agreement for the promotion of tobacco products provided for arbitration of "the interpretation of this agreement, or the rights of either of the parties thereunder." When the licensor demanded arbitration of damages suffered by failure of the licensee to promote the sale of the tobacco products and for destruction of the rights in the trade name, the licensee refused to arbitrate the issues so presented. A later court action for damages was opposed by the licensee who pleaded the arbitration clause as an affirmative defense. The District Court, however, refused to stay the court action since section 3 of the Federal Arbitration Act authorizes a stay only if the applicant "is not in default in proceeding with such arbitration." The Circuit Court, in affirming, said: "A

party cannot raise unjustifiable objections to a valid demand for arbitration, all the while protesting its willingness in principle to arbitrate and then, when the other side has been forced to abandon its demand, seek to defeat a judicial determination by asking for arbitration after suit has been commenced." ***Lane, Ltd. v. Larus & Brother Co.***, 243 F. 2d 364 (Second Circuit, Lumbard, C. J.).

COURT DIRECTS ARBITRATION OF CLAIM FILED AFTER EXPIRATION OF TIME LIMITS SET IN AGREEMENT, the court holding that arbitrators may take into account the fact that the claim was made eight months after delivery of merchandise, where the contract required claims for latent defects to be made within ninety days, and that arbitrators may also judge whether it was physically possible to ascertain such defects within the time limits of the contract. The decision of Special Term (*Arb. J.* 1956, p. 55), was reversed by the Appellate Division, and a motion for a stay of arbitration was denied, such decision being unanimously affirmed by the Court of Appeals. ***Novelty Fabrics Corp. v. Lawrence J. Fink, Inc.***, 2 N.Y. 2d 894, 161 N.Y.S. 2d 147.

ARBITRATION MAY BE DEMANDED BY PARTY WHO ADMITTEDLY BREACHED CONTRACT BY REFUSING TO MAKE PAYMENTS ON GROUNDS OF DELAYED AND DEFECTIVE WORK, under a contract requiring performance while arbitration is pending. Said the court: "The claims and counterclaims—as to performance and breach, the settlement of accounts, and directives and amounts—must be submitted to the agreed-upon arbitration. 'An agreement to arbitrate may be enforced even by the party violating the agreement (*Kahn v. National City Bank*, 284 N.Y. 515; *Lipman v. Haeuser Shellac Co.*, 289 N.Y. 76'." ***Complete Machinery & Equipment Co., Inc. v. Brown-Turner, Inc.***, 4 Misc. 2d 786 (Matthew M. Levy, J.).

COURT WILL NOT ENFORCE AGREEMENT TO ARBITRATE RENEWAL TERMS OF CONTRACT AS PROVIDED FOR IN EXPIRED CONTRACT INASMUCH AS THE FEDERAL ARBITRATION ACT DOES NOT CONFER JURISDICTION TO ENFORCE "PROSPECTIVE OR QUASI-LEGISLATIVE" AWARDS, as distinguished from "quasi-judicial" awards. The First Circuit affirmed the decision reviewed in *Arb. J.* 1956, p. 168. ***Boston Printing Pressmen's Union No. 67 v. Potter Press***, 241 F. 2d 787, Magruder, Ch. J.

MISSISSIPPI COURT REFUSES TO ENFORCE ARBITRATION IN ABSENCE OF STATE LAW PERMITTING ENFORCEMENT OF FUTURE ARBITRATION CLAUSES. The Supreme Court of Mississippi reversed a decision (*Arb. J.* 1956, p. 217) in which the lower court held that the arbitration agreement in a collective bargaining contract could be enforced under common law since such contracts affect the public welfare. To this the Supreme Court answered: "This is a matter for consideration by the Legislature and not by the Court." ***Machine Products Co., Inc. v. Prairie Local Lodge No. 1538 of Int'l Assoc. of Machinists, AFL-CIO***, Supreme Court of Miss., No. 40,465, Ethridge, J.

COURT WILL NOT ENFORCE ARBITRATION AGREEMENT IN ACCORDANCE WITH A COLLECTIVE BARGAINING CONTRACT BECAUSE NEITHER THE FEDERAL ARBITRATION ACT NOR SECTION 301, TAFT-HARTLEY ACT CONFERS JURISDICTION ON THE COURT. Said the Seventh Circuit: "A collective bargaining agreement, whether it be characterized as a contract of employment or otherwise, does not evidence a transaction. It evidences an agreement which determines the terms and conditions of employment and which in itself does not involve commerce." The court added that although the Norris-La Guardia Act did not constitute a bar to the union's obtaining specific performance by the employer of the arbitration agreement, Section 301 of the Taft-Hartley Act did not permit specific enforcement since it did not create a "substantive right." *United Steelworkers of America, CIO v. Galland-Henning Mfg. Co.*, 241 F. 2d 323 (Major, C. J.). This decision was reversed by the U.S. Supreme Court on June 10, 1957, on the authority of the *Lincoln Mills* case. See Editorial on page 65, this issue of the *Journal*.

IV. THE ARBITRATOR

ARBITRATOR IS NOT DISQUALIFIED BY PAST RELATIONSHIP WITH AN INSURANCE AGENCY WITH WHICH ONE OF THE PARTIES PLACED INSURANCE AT DIFFERENT TIMES, particularly where party objecting to an award had knowledge of the relationship and did not object during the arbitration. Said the court: "Something more than a vague and rather remote business relationship between the arbitrator and one of the parties to the arbitration is certainly needed if the losing party seeks to vacate the award on the ground of 'evident partiality' of one of the arbitrators. It is well established that the mere fact that there is some business relationship between the arbitrator and one of the parties to the arbitration is not in and of itself sufficient to disqualify the arbitrator. . . . Where a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection." *Ilios Shipping & Trading Corp., S.A. v. American Anthracite & Bituminous Coal Corp.*, 148 F. Supp. 698 (Dawson, D. J.).

PARTY-APPOINTED ARBITRATOR IS NOT DISQUALIFIED BY REASON OF HAVING BEEN AN OFFICER OF A CORPORATION WHICH ONCE DID BUSINESS WITH THE PARTY APPOINTING HIM. Confirming the award, the court referred to the decision in *De Nicola v. Polcini*, 2 A.D. 2d 675, 152 N.Y.S. 2d 995 (*Arb. J.* 1956, p. 168). *Brookside Mills v. Millworth Converting Corp.*, N.Y.L.J., February 7, 1957, p. 7, Saypol, J.

CALIFORNIA COURT APPOINTS "THIRD ARBITRATOR" ON FAILURE OF TWO PARTY-APPOINTED ARBITRATORS TO MAKE THIS CHOICE, the court finding authority for this action in sec. 1283 Cal. Code of Civil Procedure which deals with failure of an arbitrator to fulfill his duties. *Downer Corp. v. Union Paving Co.*, 304 P. 2d 756 (Cal. App. Third Dist., Peek, J.).

AWARD VACATED AND REHEARING DIRECTED WHEN EMPLOYER WAS NOT GIVEN TEN DAYS NOTICE IN ACCORDANCE WITH COLLECTIVE BARGAINING AGREEMENT. The notice which was given pertained to a grievance other than that which the arbitrator awarded upon. The court held that the arbitrator's permission to amend the grievance without notice "constituted misbehavior within the purview of section 1462, subdivision 3, of the Civil Practice Act, even though it may be assumed that the arbitrator acted in good faith." *Goldman Bros. v. Local 32K, Building Service Employees Int'l Union, AFL-CIO,* N.Y.L.J., June 10, 1957, p. 11, Schwartzwald, J.

ARBITRATOR IS NOT DISQUALIFIED BY THE FACT THAT HE WAS ONCE A CLIENT OF A LAW FIRM REPRESENTING ONE OF THE PARTIES, particularly where that law firm was withdrawing from the proceedings. The court held that in the absence of any connection between the arbitrator and the law firm since 1951 there was no basis for disqualification of the arbitrator. "The further circumstance of the withdrawal of the law firm from the proceeding removes any possible reason for disqualification." *Grainger v. Shea Enterprises, Inc.,* N.Y.L.J., May 2, 1957, p. 6, Aurelio, J.

AWARD VACATED WHEN ARBITRATORS APPORTIONED COSTS IN A WAY DIFFERENT FROM THAT SPECIFIED IN THE CONTRACT. The contract had required that "each of the parties thereunder shall pay one half the expenses of the arbitration." The arbitrators' award departing from this contractual arrangement led to vacation of that part of the award. *Brown-Turner, Inc. v. Complete Machinery & Equipment Co.,* N.Y.L.J., May 31, 1957, p. 6, Aurelio, J.

V. THE PROCEEDINGS

SERVICE BY MAIL FROM NEW YORK UPON A PARTY IN FLORIDA IS ADEQUATE NOTICE INASMUCH AS NEW YORK LAW PERMITS SUCH SERVICE AND PARTIES HAD AGREED TO ARBITRATE IN NEW YORK. The court held that such notice was adequate to confer jurisdiction of New York Federal District Court in personam over defendant for the purpose of compelling arbitration. The Second Circuit affirmed a decision referred to in *Arb. J.* 1956, p. 215. *Farr & Co. v. Cia. Intercontinental De Navegacion de Cuba, S.A.,* 243 F. 2d 342 (Second Cir., Swan, C. J.).

EXCHANGE OF CORRESPONDENCE BETWEEN ATTORNEYS EXPRESSING INTENTION OF PARTIES TO EXTEND HEARINGS AND PERMIT THE ARBITRATORS TO RENDER A LATE AWARD CONSTITUTED A WAIVER of the sixty day period under Sec. 8159, General Statutes of Connecticut, within which an award must be rendered. Furthermore, the court said, briefs filed in arbitration proceedings constituted ratification of the extension of time for hearings by the arbitrator. *Nathan v. United Jewish Center of Danbury,* 20 Conn. Supp. 183, 129 A. 2d 514 (Superior Ct. of Conn., Fairfield County, Murphy, J.).

AN ARBITRATION AGREEMENT MAY BE ASSERTED TO STAY A COURT ACTION PURSUANT TO SECTION 1451 OF THE NEW YORK CIVIL PRACTICE ACT but such an agreement cannot be pleaded in a court action as a defense or a counterclaim (*American Reserve Ins. Co. v. China Ins. Co.*, 297 N.Y. 322, 326-327). *Pfeiffer v. Berke*, 4 Misc. 2d 918 (Supreme Ct., Special Term, Kings County, Charles E. Murphy, J.).

PRE-HEARING EXAMINATION CANNOT BE HAD IN FEDERAL COURT ON MATTERS PENDING BEFORE ARBITRATION TRIBUNALS. Said the court: "By voluntarily becoming a party to a contract in which arbitration was the agreed mode for settling disputes thereunder respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations. 'A main object of a voluntary submission to arbitration is the avoidance of formal and technical preparation of a case for the usual procedure of a judicial trial.' 1 Wigmore, Evidence §4(e) (3d ed. 1940). Arbitration may well have advantages but where the converse results a party having chosen to arbitrate cannot then vacillate and successfully urge a preference for a unique combination of litigation and arbitration. . . . The fundamental differences between the fact-finding process of a judicial tribunal and those of a panel of arbitrators demonstrate the need of pretrial discovery in the one and its superfluity and utter incompatibility in the other." *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., Inc.*, D.C. S.D. N.Y., Civ. No. 114-258, Bicks, D. J.

VI. THE AWARD

FAILURE OF ARBITRATOR TO NAME EMPLOYEES TO WHOM BACK PAY COMPENSATION WAS AWARDED CONSTITUTED VAGUENESS AND AMBIGUITY SUCH AS TO WARRANT VACATION OF AWARD. The court described the circumstances as follows: "It was claimed that three persons had been designated by the union to replace non-union employees, in accordance with its demand predicated upon the contract. The persons allegedly so designated were not otherwise identified. The award thus directs payments to unnamed individuals and in that form is so imperfectly executed that it cannot be deemed to be a 'final and definite award upon the subject-matter submitted.' Civil Practice Act, Section 1462, subd. 4; *Morantz v. Berliant*, 275 App. Div. 873, 89 N.Y.S. 2d 78." *C. Kyne, as President of Culinary Workers Union of New York, Local 923 v. Molfetas*, 3 A.D. 2d 384, 160 N.Y.S. 2d 605 (First Dept., March 26, 1957).

COURT MAY NOT INCREASE AWARD TO PROVIDE FOR ATTORNEYS' FEES. Said the California Court of Appeal: "Since the arbitrators made no allowance for attorneys' fees for either party the trial court, in the absence of any other agreement or statute so providing, could not increase the amount of the award to cover the cost of attorneys' services rendered to the parties in the arbitration proceeding." *Gerard v. Salter*, 304 P. 2d 237 (Cal. App. Fourth Dist., Griffin, J.).

AWARD DENYING DAMAGES TO CHARTERER AND DECLINING TO DIRECT SHIPOWNER TO PERFORM BALANCE OF THE CHARTER PARTY AGREEMENT UPHELD where arbitrators found charterer defaulted by failure to make payments. A contract between a shipping company and a charterer provided for delivery of 36 vessels for carrying coal. After the charterer delayed making payments on the first four voyages, the shipping company refused to provide the remaining 32 ships. An arbitration award upheld the shipping company, denying a claim for damages by the charterer and refusing to direct the shipowner to continue performance of the contract. In confirming the award, the court said: "The arbitrators in their award concluded that the owners (petitioner herein) were justified in refusing to nominate further ships in view of the defaults by respondent in making prompt payments on the first four voyages. The arbitrators therefore refused to order further performance by the petitioner. The arbitrators made no award of damages for the failure to provide further ships. Since the arbitrators had decided that the owners were justified in failing to provide further ships it is understandable that the arbitrators awarded no damages. This appears to be a situation where the losing party to an arbitration is now clutching at straws in an attempt to avoid the results of the arbitration to which it became a party." *Ilios Shipping & Trading Corp., S.A. v. American Anthracite & Bituminous Coal Corp.,* 148 F. Supp. 698 (Dawson, D. J.).

COURT WILL NOT REVIEW ARBITRATOR'S FINDING THAT A DISCHARGE WAS NOT FOR JUST CAUSE AFTER EMPLOYER AND UNION SUBMITTED QUESTION OF ARBITRABILITY TO AN ARBITRATOR, despite fact that the submission provided that "neither party shall be deemed to have waived any rights given them by law." A majority award reinstating the employee with full seniority rights and back pay was confirmed, and this judgment affirmed by a majority of the Supreme Court, the latter stating that the "company may not agree to arbitrate a question and then, if the decision goes against it, litigate the question in another proceeding. . . . The arbitrators here decided that the controversy was arbitrable and that [the] discharge was improper. The merits of the controversy between the parties are not subject to judicial review." *O'Malley, as Secretary, Local 128, Oil Workers Int'l Union, CIO v. Petroleum Maintenance Co.,* 48 A.C. 105, 308 P. 2d 9 (Carter. J.).

ARBITRATORS ACTED WITHIN THEIR AUTHORITY IN AWARDING INTEREST, EXPENSES AND FEES OF ARBITRATORS in the absence of any limiting clause in the arbitration agreement, inasmuch as such award was "necessarily a part of the duties contemplated by the arbitration provision." *Downer Corp. v. Union Paving Co.,* 304 P. 2d 756 (Cal. App. Third District, Peek, J.).

CALIFORNIA COURT CONFIRMS AWARD, HOLDING ARBITRATORS FINAL JUDGES ON "QUESTIONS OF FACT OR OF LAW" and that awards "may not be reviewed except as provided in the statute," referring to *Crofoot v. Blair Holding Corp.,* 260 P. 2d 156, 171. *Downer Corp. v. Union Paving Co.,* 304 P. 2d 756 (Cal. App. Third Dist., Peek, J.).

COSTS OF COURT PROCEEDINGS ON BINDING FORCE OF AN ARBITRATION CLAUSE IN CONFIRMATION OF ORDER FORMS MAY BE GRANTED TO A PARTY WHO PREVAILED IN HIS ALLEGATION THAT THE CONTROVERSY WAS ARBITRABLE (cee *Arb. J.* 1957, p. 45). The court referred to sec. 1459, N.Y. C.P.A. permitting costs to be granted in "special proceedings," distinguishing this provision from sec. 1464 which deals only with costs for entry of judgment on an award. *Perfect Fit Products Mfg. Co. v. Pantasote Co.,* 5 Misc. 2d 348, 161 N.Y.S. 2d 376 (supplemental memorandum p. 351, 378).

DECISION BY "COURT OF ETHICS" OF A REALTY BOARD WHICH ORDERED RESTITUTION TO INJURED PARTY CONSTITUTES A VALID AWARD WHEN SUCH DECISION IS AFFIRMED BY BOARD OF DIRECTORS IN ACCORDANCE WITH THEIR BY-LAWS. The court nevertheless declined to confirm the award because of lack of reasonable certainty of the submission, although both parties had participated in the arbitration. The Supreme Court of Arizona found some doubt as to whether the Court of Ethics could resolve property rights involving claims of one realtor for commissions on sales denied to him by preemptive actions of other realtors. Affirming the judgment of dismissal, the Supreme Court of Arizona said: "To rule otherwise would open the door to using agreements to arbitrate with subtle provisions as a vehicle of deception which would work to deprive an innocent and unwitting party of his day in court, thus perverting this otherwise commendable means of settling controversies." *Fineg v. Pickrell,* 305 P. 2d 455 (La Prade, Ch. J.).

DISPUTE OVER WHETHER SHIPOWNER WAS OBLIGATED TO FURNISH A VESSEL AFTER "CANCELLING DATE FOR LAST VOYAGE" WAS NOT RESOLVED BY AWARD WHICH HELD THAT THE QUESTION OF THE NUMBER OF VOYAGES TO BE PERFORMED WAS "PREMATURE." The court therefore directed arbitration as to the meaning of the contract clause providing that the provisions of the charter remain in effect for 25 consecutive voyages. In doing so, the court instructed the arbitrators that the question of "prematurity" was not before them. "Prematurity was urged upon the arbitrators by the owner not as a matter in dispute under the contract, but by way of answer to the charterer's arguments addressed to the merits of the construction issue." *Stinnes, G.m.b.H. v. Paular Maritime Agency Corp.,* 149 F. Supp. 678 (S.D. N.Y., Bicks, D. J.).

AWARD IN A DISPUTE BETWEEN HOME OWNER AND CONTRACTOR OVER FAULTY CONSTRUCTION IS NOT RES JUDICATA IN SUBSEQUENT ACTION BY HOME OWNER AGAINST ARCHITECT FOR NEGLECT OF DUTIES BY FAILURE TO PROVIDE ADEQUATE SUPERVISION. The court held that the architect and the contractor were separate and independent parties in their relationship with the home owner and that the identity of issues necessary for res judicata were not met by the home owner's action against the architect. The court therefore declined to bar that action. *Pancoast v. Russell,* 307 P. 2d 719 (Cal. App. Second Dist., Doran, J.).

AWARD REVERSED AND CONTROVERSY REMANDED TO ARBITRATOR WHEN BASED UPON APPROXIMATIONS OF DISTANCE UNDER CIRCUMSTANCES WHERE EVEN A FEW INCHES WERE CRITICAL. Building owners and a contractor submitted to an engineer the sole question whether the location of a building necessitated a sewage pump. The award in favor of the building owners was deemed by the court to be too uncertain to permit entry of judgment inasmuch as it was "based on considerable hearsay evidence and approximations of distances, where even a few inches became important." A judgment confirming the award "without making some provision for their [owners'] right to further pursue their claim," was reversed and the cause remanded "to the agreed arbitrator or some other arbitrator mutually agreed upon." *Davidson v. S. S. Jacobs Co.*, 93 So. 2d 731 (Supreme Ct. of Florida, Roberts, J.).

THREE MONTHS' TIME LIMIT FOR APPLICATION TO CONFIRM AWARD STARTS RUNNING ON COMPLETION OF ADDITIONAL CLARIFICATION FUNCTIONS REQUESTED OF ARBITRATORS BY PARTIES, NOT AT TIME OF RENDERING OF ORIGINAL AWARD. The court held that when parties to a partnership dispute arbitration asked the arbitrators and extended the time for filing an application for an order the arbitrators to clarify their award they in effect enlarged the powers of confirming the award. In affirming the award, the court said: "The so-called clarification of the award was made pursuant to stipulation of the parties; it incorporated the original award as a part of it; it formed a complete execution of the power delegated to the arbitrators; it was not until it was made that the object of their appointment was fulfilled and their authority terminated." *Jannis v. Ellis*, 308 P. 2d 750 (Cal. App. Second Dist., Vallé, J.).

MINNESOTA COURT CONFIRMS AWARD IN WHICH ARBITRATORS INTERPRETED MEANING OF AMBIGUOUS SENIORITY PROVISION OF COLLECTIVE BARGAINING AGREEMENT. The agreement provided that in case layoffs became necessary, the employees having the "greatest length of continuous service, skill and ability" would be retained. An arbitrator's interpretation of this clause was challenged in the District Court, which upheld the award. The Minnesota Supreme Court affirmed the judgment, saying: "Arbitrators in arriving at the intended meaning may reasonably take into consideration the fact that one of the principal purposes for entering into a collective bargaining agreement is usually to secure for the employees the prized right of seniority in case of layoff and promotion." *Cournoyer v. American Television & Radio Co.*, 28 LA 483 (Minn. Supreme Ct., Matson, J.).

AWARD OF INTEREST MAY RUN FROM TIME OF ENTRY OF JUDGMENT CONFIRMING THE AWARD BUT NOT FROM ANY PRIOR TIME inasmuch as under California law, "in the absence of agreement or statute to the contrary, interest is not recoverable on an unliquidated demand but is allowable only after it had been merged in a judgment." *Gerard v. Salter*, 304 P. 2d 237 (Cal. App. Fourth Dist., Griffin, J.).

FEDERAL DISTRICT COURT IN CHICAGO ENFORCES JUDGMENT OF NEW YORK COURT ON AN AWARD resulting from a sales contract between a New York firm and an Illinois corporation providing for "arbitration by the Association of Food Distributors, Inc. of New York in accordance with its rules, then prevailing." The defendant submitted a written presentation of its case by mail in lieu of its being present at the hearing. Awards in favor of the New York party were confirmed after papers had been personally served in Illinois upon the defendant who failed to appear in the New York court action. Enforcement of the New York judgment was granted by the Federal District Court, Chicago, which held that sec. 1450 N.Y. C.P.A. does not require a court order directing arbitration, and that full faith and credit (art. IV sec. 1 of the National Constitution), must be extended to the judgment of the New York court. *Pan American Food Co. v. Lester Lawrence & Son, Inc.*, N.D. Ill., No. 55-C-1497.

LABOR ARBITRATION AWARD OF CONNECTICUT BOARD OF MEDIATION AND ARBITRATION CONFIRMED DESPITE FACT THAT IT WAS RENDERED AFTER THE 15 DAY TIME LIMIT of sec. 3029(d) inasmuch as this provision is deemed "directory" rather than "mandatory," under the authority of the *Shapiro* case, 138 Conn. 57, 68. Furthermore, the court held, sec. 8159, Connecticut Statutes, which requires awards to be rendered within 60 days "from the date on which the arbitrator was empowered to act," is not applicable to arbitration before the Connecticut Board of Mediation and Arbitration. *Danbury Rubber Co. v. Local No. 402, United Rubber, Cork, Linoleum and Plastic Workers of America, CIO,* Superior Ct., Fairfield County, Conn., No. 100853, January 10, 1957.

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which placed sanctions behind agreements to arbitrate grievance disputes . . ." At the same time, it must be remembered that arbitration is a voluntary process, relying in the last analysis on the "consent of the governed"—that is, on the voluntary agreement of both parties to a dispute to settle their controversy through private impartial procedures. The Supreme Court's action copes with a specific immediate problem. Its chief advantage, however, will be evident in the long run, if it encourages direct action by the states in adopting modern arbitration laws.

In this connection, it is interesting to note that the movement for adoption of the Uniform Arbitration Act, with which readers of *The Arbitration Journal* are familiar, is progressing. The Act was adopted in Minnesota on April 24, 1957, it became law in Florida two months later and it seems in a fair way of being enacted in several other states before present sessions of legislatures adjourn.

FORM OF BEQUEST

I give, devise and bequeath to the American Arbitration Association, Inc. in New York .....

.....

.....

(Insert the amount of money bequeathed, or a description either of specific personal or real property, or both, given, or if it be the residue of an estate, state the fact.)

NOTE: ***All contributions to AAA by gift or membership enrollment are tax exempt.***